TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 404

THE PEOPLE OF THE STATE OF NEW YORK EX REL. ANNIE COHN, APPELLANT,

vs.

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

FILED SEPTEMBER 28, 1936.

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IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

NOTICE OF APPLICATION FOR A WRIT OF CERTIORARI

SIRS:

Please Take Notice that upon the annexed petition of Annie Cohn, verified the 20th day of August, 1935, an application will be made on her behalf at a Special Term of the Supreme Court of the State of New York, in and for the County of Albany, on the 30th day of August, 1935, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for a writ of certiorari directed to Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, as prayed in said petition and for such other and further order or relief as may be proper.

Dated, N. Y., August 20th, 1935.

Yours, etc., Cohn & Cohn, Attorneys for Applicant, Office and P. O. Address, 2 Rector Street; Borough of Manhattan, City of New York.

To Mark Graves, John J. Merrill, John P. Hennessey, As Commissioners constituting the State Tax Commission of the State of New York.

[fol. 3] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

PETITION FOR AN ORDER THAT A WRIT OF CERTIORARI ISSUE

The petition of Annie Cohn respectfully shows:

First. At all the times hereinafter mentioned, the petitioner was and still is a widow, and resided in the City, County and State of New York, except since the Fall of 1933, petitioner has been and now is a resident of the City of Paterson, in the County of Passaic and State of New Jersey.

Second. Respondents are the Commissioners constituting the State Tax Commission of the State of New York.

Third. In April, 1932, and in April, 1933, petitioner duly made personal income tax returns for the years 1931 and 1932, respectively, pursuant to the Tax Law of New York and Section 367 thereof, and paid to the State Tax Commission the amounts of tax payable as the same appeared from the face of such returns, to wit: $792.89 and $606.80, respectively.

Fourth. On or about April 12th, 1934, petitioner duly made application pursuant to Article 574 of the Tax Law, sworn to on said date, for refunds of said taxes as erroneously or illegally collected, by forwarding to and filing with the New York State Income Tax Bureau, State Office [fol. 4] Building, Albany, New York, claims for refund, on form 110, on or about said date and within two years from the time of the filing of the aforesaid income tax returns for the years 1931 and 1932. Petitioner's canceled checks for the taxes paid accompanied said application. On or about July 24th, 1935, the State Tax Commission made its determination denying said application. Copies of said determination and of the letters written by said Tax Commission to petitioner in reference to said claims for refund, dated May 14th, 1934 and January 21st, 1935, are hereto annexed and marked Schedules "A", "B" and "C", respectively, also petitioner's claims for refund, marked Schedules "D" and "E".

Fifth. On February 10th, 1913, Marcus Cohn, the husband of petitioner, died testate, a resident of the City of Paterson, County of Passaic, State of New Jersey, devising and bequeathing to petitioner the entire net income from his estate for and during her widowhood. Said Will was duly probated in the Surrogate's Office of the County of Passaic, State of New Jersey, in February, 1913. Of the income reported by petitioner in said income tax return for the year 1931, $18,897.39 was rents from testator's real estate situate in Paterson, New Jersey, and $8,057.08 was interest from testator's real estate mortgages on property in Paterson, New Jersey, the bonds and mortgages also being physically located in Paterson, New Jersey; of the income reported by petitioner in said income tax return for the year 1932, $16,213.65 was rents from testator's real [fol. 5] estate situated in the City of Paterson, New Jersey, and $7,615.50 was interest from testator's real estate mort-

gages on property in Paterson, New Jersey, where the bonds and mortgages were also physically located.

Sixth. Petitioner is advised, and on information and belief alleges, that under the law of the State of New Jersey, a mortgage is an executed conveyance of land to secure a debt with a defeasance.

Seventh. Petitioner is advised, and on information and belief alleges, that the determination of the State Tax Commission, as aforesaid, is erroneous and that the income taxes paid by petitioner for the years 1931 and 1932 were erroneously and illegally collected, and that she is injured and ag-rieved thereby on the ground that her income, as aforesaid, was from rents and mortgage interest from real estate situate in the State of New Jersey and such income is not legally taxable by the State of New York and said tax would be, in substance and effect, a tax upon real estate and tangible property situated outside the State of New York and would violate petitioner's rights under the Constitution and laws of the State of New York and under the Constitution of the United States and the fourteenth amendment thereof.

Eighth. On or about October 25th, 1934, petitioner received a check from the State Tax Commission refunding $25.24, an overpayment made by petitioner in her return for the year 1932.

[fol. 6] No previous application for the writ sought herein has been made to any Court or Judge.

Wherefore, the petitioner prays that the said determination of the State Tax Commission may be reviewed and that said payments for the years 1931 and 1932 be declared to have been erroneously or illegally collected, and that said payments less $25.24 be refunded, and that a writ of certiorari may issue out of this Court to the respondents as Commissioners constituting the State Tax Commission of the State of New York, ordering them to make return to said writ pursuant to law and that the petitioner may have such other and further order or relief as may be proper.

Dated, New York, August 20th, 1935.

Annie Cohn, Petitioner. Cohn & Cohn, Attorneys for Petitioner, Office and P. O. Address, 2 Rector Street, Borough of Manhattan, City of New York, N. Y.

[fol. 7] SCHEDULE "A", ANNEXED TO FOREGOING PETITION

(Letterhead of Department of Taxation and Finance)

Albany

Jul. 24, 1935.

Cohn & Cohn, 2 Rector St., New York City.

Re 1931 and 1932 Claims for Refund, Filed in Behalf of Annie Cohn

GENTLEMEN:

This will acknowledge receipt of your letter of July 8, 1935 in further reference to the above matter.

You are advised in answer to your inquiry at the recent session of the Legislature of New York State, Section 359 Subdivision 1 of the Tax Law was amended by Chapter 933 of the Laws of 1935, retroactive to 1919 and subsequent years, under which it is provided the rental income derived by a resident of New York State from real property located without the State of New York constitutes taxable income. Under the above amendment to Section 359, the rental income derived by the taxpayer from sources outside of New York State constitutes taxable income in both the years 1931 and 1932.

The refund claims as filed are, therefore, respectfully denied and the file for 1931 and 1932 closed under this date.

Very truly yours, State Tax Commission, by Roy H. Palmer, Assistant Director, Chief-Audit Division, Income Tax Bureau.

FJM:EXB.

[fol. 8] SCHEDULE "B", ANNEXED TO FOREGOING PETITION

(Letterhead of Department of Taxation and Finance)

Albany

May 14, 1934.

Cohn & Cohn, 2 Rector Street, New York City.

Re Claims for Refund 1920 to 1932 Annie Cohn

GENTLEMEN:

This will acknowledge receipt of your letter dated April 17th with claims for refund for Annie Cohn for the period

from 1920 to 1930 as well as claims for refund filed on April 12th for the years 1931 and 1932.

Under the Tax Law and Regulations claims for refund must be filed within two years from the date of filing a return or adjustments made on or within three years. The claims for the period from 1929 to 1930 are, therefore, respectfully denied.

The claims for the years 1931 to 1932 will be held in abeyance pending a final determination in the case of Pierson vs. Lynch which is to be carried to the United States Supreme Court.

Very truly yours, State Tax Commission, by Roy H. Palmer, Assistant Director, Chief-Audit Division, Income Tax Bureau.

GPK:MC.

[fol. 9] SCHEDULE "C", ANNEXED TO FOREGOING PETITION

(Letterhead of Department of Taxation and Finance)

Albany

Jan. 21, 1935.

Colin & Cohn, 2 Rector Street, New York City.

Re Claims for Refund Annie Cohn, 1931 and 1932

GENTLEMEN:

Acknowledgment is made of the receipt of your communication under date of January 11th, in further reference to the above matter.

You are advised that the Tax Commission has not as yet had sufficient time to determine the full effect of the decision in the Pierson Case as affecting other taxpayers who did not join in the action. The matter is now being considered and at such time as the question is definitely decided any adjustment of the returns of the taxpayer which may be required will be made.

Very truly yours, State Tax Commission, by Roy H. Palmer, Assistant Director, Chief-Audit Division, Income Tax Bureau.

FJM/MMcK.

[fol. 10] SCHEDULE "D", ANNEXED TO FOREGOING PETITION

Claim for Refund

Income Taxes Erroneously Paid or Illegally Collected

This claim should be forwarded to New York State Income Tax Bureau, State Office Building, Albany, N. Y.

Year 1931.

STATE OF NEW JERSEY,
County of Passaic, ss:

Print Name of Claimant COHN, ANNIE.
Address: 555 East 27th Street, Paterson, N. J. formerly 235 West 102nd Street, New York, N. Y.

The deponent, being duly sworn, deposes and says that this claim is made on behalf of the claimant named above, and that the facts stated below with reference to the claim are true and complete.

1. Year for which claim is made 1931.

2. Amount of Refund now claimed $792.89.

3. Amount of Tax paid $792.89.

Deponent verily believes that the amount stated in Item 2 should be refunded and now asks and demands refund of said amount for the following reasons: Pierson v. Lynch, 237 App. D. 763, 263 N. Y. S. 259, aff'd. by Court of Appeals, holds that rents received by a resident of New York [fol. 11] from real property in another state is not taxable as income in New York. Likewise under the decisions cited in said case, interest derived from mortgages in the State of New Jersey is not taxable as income in New York. Deponent's income for the year 1931 is as follows:

Interest received from Marcus Cohn Est., Paterson, N. J.	$10,013.43
Dividends from Marcus Cohn Est., Paterson, N. J.	11,636.56
Rents, less taxes $15,524.59 and Agents $500.00 from Paterson, N. J.	18,897.39
	$40,547.38

Deductions

Interest	$ 140.71	
Loss on Sale of Securities	12,714.53	
Luxury tax	150.00	
Contributions	220.00	
Exemption	2,500.00	
		15,725.04
Net Income		$24,822.34
Rents from real estate in Paterson, N. J.	$18,897.39	
Interest from real est. mtgs., Paterson, N. J.	8,057.08	26,954.34

Deponent paid $792.89 when she had no income subject to tax.

5. Deponent further alleges that no claim has heretofore been presented for the refunding of the whole or any part [fol. 12] of the amount stated in Item 2, and that no part has heretofore been refunded to claimant.

Annie Cohn.

Sworn to and subscribed before me this 12th day of April, 1934. Maurice Cohn, Master in Chancery in New Jersey.

SCHEDULE "E", ANNEXED TO FOREGOING PETITION

Claim for Refund

Income Taxes Erroneously Paid or Illegally Collected

This claim should be forwarded to New York State Income Tax Bureau, State Office Building, Albany, N. Y.

Year 1932.

STATE OF NEW JERSEY,
County of Passaic, ss:

Print Name of Claimant COHN, ANNIE.
Address: 555 East 27th Street, Paterson, N. J. Formerly 235 West 102nd Street, New York, N. Y.

The deponent, being duly sworn, deposes and says that this claim is made on behalf of the claimant named above,

[fol. 13] and that the facts stated below with reference to the claim are true and complete.

1. Year for which claim is made 1932.

2. Amount of Refund now claimed $606.80

3. Amount of Tax paid $606.80

Deponent verily believes that the amount stated in Item 2 should be refunded and now asks and demands refund of said amount for the following reasons: Pierson v. Lynch, 237 App. D. 763, 263 N. Y. S. 259, aff'd. by Court of Appeals, holds that rents received by a resident of New York from real property in another state is not taxable as income in New York. Likewise under the decisions cited in said case, interest derived from mortgages in the State of New Jersey is not taxable as income in New York. Deponent's income for the year 1932 is as follows:

Interest received from Marcus Cohn Est., Paterson, N. J.	$9,264.53
Dividends received from Marcus Cohn Est., Paterson, N. J.	6,842.42
Rents, less taxes $13,766.83 and agents $500.00 from Paterson, N. J.	16,213.65
	$32,320.60

[fol. 14] Deductions		
Interest	$118.12	
Loss on Sale of Securities	8,083.46	
Loss on Mortgages	1,800.00	
Luxury tax	150.00	
Contributions	134.00	
Exemption	2,500.00	
		12,785.58
Net Income		$19,535.02
Rents from real estate in Paterson, N. J.	$16,213.65	
Interest from real estate mtgs., Paterson	7,615.50	23,829.15

Deponent paid $606.80 when she had no income subject to tax.

5. Deponent further alleges that no claim has heretofore been presented for the refunding of the whole or any part

of the amount stated in Item 2, and that no part has heretofore been refunded to claimant.

Annie Cohn.

Sworn to and subscribed before me this 12th day of April, 1934. Maurice Cohn, Master in Chancery of New Jersey.

(Verified by Annie Cohn, August 20, 1935.)

[fol. 15] STATE OF NEW YORK:

THE STATE TAX COMMISSION

In the Matter of Claims for Refund and Application for Revision of the Personal Income Taxes of ANNIE COHN for the Years 1931 and 1932

DETERMINATION

Returns of income on behalf of the above named taxpayer for the calendar years 1931 and 1932 having been duly filed at the times when required by statute in accordance with the provisions of article 16 of the Tax Law, and taxes in the amounts of $792.89 having been paid for the year 1931 and $606.80 for the year 1932; and the return for 1932 having been duly audited, a refund was duly granted to the taxpayer in the amount of $25.24 on the 2nd day of October, 1934, which refund was mailed to the taxpayer in usual course thereby reducing the amount paid for the year 1932 to $581.56; and the taxpayer on or about April 13th, 1934 having filed claims for refund for the total of amounts of the taxes paid in each of said years 1931 and 1932, which claims were received and accepted as applications for revision under section 374 of the Tax Law; and the facts having been stipulated by the taxpayer with this Commission and the formal hearing having been waived; and it appearing that only questions of law are [fol. 16] involved, and the taxpayer through her attorneys, Cohn & Cohn, No. 2 Rector Street, New York City, Maurice Cohn, of counsel having presented verbal argument thereon, and such questions of law having been duly considered by the Commission, it is

Determined: That the computation of the tax as set forth in taxpayer's return for 1931 was correct and in accordance with the law, and that the tax as computed in the taxpayer's return for 1932 after adjustment upon audit and refund made in the amount of $25.24 was correct, and that the taxes thus paid by the taxpayer for said years were due and payable, and did not include any taxes or other charges which should not have been lawfully demanded, and that no payment has been illegally made or exacted thereupon; and that the taxpayer is not entitled to any further resettlement of the tax nor to the refunds claimed.

Dated, Albany, N. Y., September 12th, 1935.

The State Tax Commission, (Signed) Mark Graves, Commissioner. (Signed) John P. Hennessey, Commissioner.

[fol. 17] In Supreme Court of New York, Albany County

Order that Writ of Certiorari Issue—August 30, 1935

On reading and filing the petition of Annie Cohn, verified the 20th day of August, 1935, and the notice of application for an order for a Writ of Certiorari, dated August 20th, 1935, with proof of due service thereof, and the stipulation and statement of facts dated September 16, 1935, and it appearing that said Annie Cohn has paid to the State Tax Commission the full amounts of taxes for the years 1931 and 1932, as the same appeared from the face of the returns filed by her for said years, and on motion of Cohn & Cohn, attorneys for the petitioner, it is

Ordered, that a Writ of Certiorari do issue from and out of this Court directed to Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, to review the decision and determination of the said State Tax Commission mentioned and described in the petition and the questions involving the merits therein mentioned, which Writ shall be returnable at the office of the Clerk of the County of Albany within twenty (20) days after service

thereof upon the said State Tax Commission of the State of New York.

Enter.

Sidney F. Foster, Justice of the Supreme Court of the State of New York.

[fol. 18] In Supreme Court of New York, Albany County

Writ of Certiorari

Whereas, we have been informed by the petition of Annie Cohn, verified the 20th day of August, 1935, that certain proceedings have been had before the State Tax Commission of the State of New York, upon the application made on her behalf on or about April 12th, 1934, for refunds of $792.89 and $606.80 (less $25.24), personal income tax payments made by her to the State Tax Commission for the years 1931 and 1932, respectively, as set forth in said petition, and that the State Tax Commission made its determination, dated July 24th, 1935, denying the same, the said Annie Cohn having now made an application to the Court for a Writ of Certiorari to review said decision and determination of said State Tax Commission, and we, being willing for certain purposes to be certified of such proceeding, do hereby command and strictly enjoin Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners constituting the State Tax Commission of the State of New York, that they certify and return the accounts and all the evidence before them upon the application of said Annie Cohn for refunds of said payments for personal income taxes made by her for the years 1931 and 1932, and all the evidence, documents, reports, records and papers relating thereto at the office of the Clerk of the County of Albany, within twenty (20) days after the serv-
[fol. 19] ice upon them of this Writ, pursuant to the provisions of the Tax Law and other requirements of law, so that our Supreme Court may further cause to be done therein what of right and according to law ought to be done and let the respondents have then and there this Writ.

Witness, the Hon. Sidney F. Foster, Justice of this Honorable Court, at the Courthouse in the City of Albany, New York, this 18th day of September, 1935.

John A. Knox, Clerk.

Cohn & Cohn, Attorneys for Relator, Office and P. O. Address, 2 Rector Street, Borough of Manhattan, City of New York, N. Y.

This Writ is hereby allowed this 18th day of September, 1935.

Sidney F. Foster, Justice of the Supreme Court of the State of New York.

[fol. 20] In Supreme Court of New York, Albany County

Stipulation and Statement of Facts

It is hereby stipulated and agreed by and between the parties above named that the hearing provided for in Section 374, Article 16 of the Tax Law, is hereby waived; that said parties agree that the subjoined statement of facts shall be in lieu of such hearing; and that the petition filed herein be amended by adding the following allegation:

"Ninth. Petitioner has duly filed an undertaking for costs and charges approved by a Justice of the Supreme Court in compliance with the provisions of Section 375 of the Tax Law."

It Is Further Stipulated and Agreed that the prayer of the petition be amended to add, after the words "and that said payments less $25.24 be refunded", the words "with interest from dates of payment".

Statement of Facts

1. During the years 1931 and 1932, Annie Cohn, the taxpayer and the relator, was a widow and resided in the Borough of Manhattan, City, County and State of New York. The respondents are the Commissioners constituting the State Tax Commission of the State of New York.

[fol. 21] 2. In April, 1932, and in April, 1933, said taxpayer duly made personal income tax returns for the years 1931 and 1932, respectively, pursuant to the Tax Law of New York and Section 367 thereof, and paid to the State Tax Commission the amounts of tax payable as the same appeared from the face of such returns, to wit: $792.89 and

$606.80, respectively. That on October 2, 1934, taxpayer was granted a refund in the amount of $25.24, thereby reducing the amount paid for the year 1932 to $581.56.

3. Contemporaneously with said returns, said taxpayer, as Executrix of the Estate of Marcus Cohn, deceased, a non-resident estate, duly filed information returns with the State Tax Commission. Said returns filed by Annie Cohn, individually and as Executrix of said estate, are made part hereof.

4. On or about April 12th, 1934, said taxpayer duly made application pursuant to Article 16 of the Tax Law and to Article 574 of the Personal Income Tax Regulations, sworn to April 12th, 1934, for refunds of said taxes as erroneously or illegally collected, by forwarding to and filing with the New York State Income Tax Bureau, State Office Building, Albany, New York, claims for refund on form 110, on or about said date and within two years from the time of the filing of the aforesaid income tax returns for the years 1931 and 1932. Said taxpayer's canceled checks for the taxes paid accompanied said application. Said applications for refund are hereby made part of this statement of facts.

[fol. 22] 5. On or about July 24, 1935, the State Tax Commission made its informal determination denying said application. On or about September 12th, 1935 the State Tax Commission made its final determination denying said application, to review which it is hereby consented that a certiorari order herein may be granted. Taxpayer's claims for refund are made part hereof.

6. On the 10th day of February, 1913, Marcus Cohn, the husband of the taxpayer, died testate, a resident of the City of Paterson, in the County of Passaic and State of New Jersey, devising and bequeathing to said taxpayer the entire net income from his estate (after certain minor bequests) for and during her widowhood. Said Will was duly probated in the Surrogate's office of the County of Passaic, State of New Jersey, in February, 1913. A copy of said Will is attached hereto and made a part hereof. The estate of Marcus Cohn, deceased, has always been administered in the State of New Jersey. The executors thereof were David Cohn, Maurice Cohn and the said Annie Cohn, to

whom letters testamentary were duly issued by the Surrogate of Passaic County in the State of New Jersey, in February 1913, since which time said executors have acted as such. The said David Cohn and Maurice Cohn were residents of the State of New Jersey during the years 1931 and 1932.

7. Of the income reported by the taxpayer in said income tax return for the year 1931, $18,897.39 was rents from testator's real estate situated in Patterson, New Jersey, and $8,057.08 was interest from testator's real estate mort-
[fol. 23] gages on property in Paterson, New Jersey, the bond and mortgages having always been physically located in Paterson, New Jersey. The said bonds and mortgages, the amounts thereof, the rate of interest and location of property are as follows:

	Interest
Webster bond and mortgage $125,000.—interest at 6%—premises 124 Main Street, Paterson, New Jersey	$7,500.00
Schenker bond and mortgage—$7,000.—interest at 6%—premises 365 20th Avenue, Paterson, New Jersey	326.25
Pirozzi bond and mortgage—$....—interest at 6%—premises 946 East 25th Street, Paterson, New Jersey	94.50
Pappas bond and mortgage—$....—interest at 6%—premises 950 East 25th Street, Paterson, New Jersey	27.00
Laskaris bond and mortgage—$....—interest at 6%—premises 922 East 23rd Street, Paterson, New Jersey	61.50
Cohen bond and mortgage—$....—interest at 6%—premises 108 Fair Street, Paterson, New Jersey	47.83
	$8,057.08

8. The amounts of the last four bond and mortgages are not stated because of the fact that they were mortgages which were amortized annually or semi-annually. The rent reported, $18,897.39, was received from the following prop-
[fol. 24] erties: 330 Main Street, 201 Main Street and 421 Main Street, Paterson, New Jersey. All of the items as

to said rents were specifically set forth in the information returns of Annie Cohn, as Executrix, filed by her for the years 1931 and 1932.

9. Of the income reported by the taxpayer in said income tax return for the year 1932, $16,213.65 was rents from testator's real estate situated in the City of Paterson, New Jersey, and $7,615.50 was interest from testator's mortgages on property in Paterson, New Jersey, where the bonds and mortgages were always physically located. The said bonds and mortgages, the amounts thereof, the rate of interest and location of property are as follows:

	Interest
Webster bond and mortgage—$125,000.—interest at 6%—premises 124 Main Street, Paterson, New Jersey	$7,500.00
Pirozzi bond and mortgage—$....—interest at 6%—premises 946 East 25th Street, Paterson, New Jersey	22.50
Pappas bond and mortgage—$....—interest at 6%—premises 950 East 25th Street, Paterson, New Jersey	9.00
Laskaris bond and mortgage—$....—interest at 6%—premises 922 East 23rd Street, Paterson, New Jersey	39.00
Cohen bond and mortgage—$....—interest at 6%—premises 108 Fair Street, Paterson, New Jersey	45.00
	$7,615.50

[fol. 25] 10. As indicated in the information returns of the said Annie Cohn, as Executrix, the office of the estate of Marcus Cohn, deceased, since decedent's death in 1913, has always been at 112 Ellison Street, Paterson, New Jersey; and all bonds and mortgages and other securities of said estate have always been kept in the safe deposit box of said estate in the Paterson National Bank, in Paterson, New Jersey.

11. In June, 1932, it was discovered that an error had been made by the taxpayer in her 1931 individual and information tax returns in stating that a loss of $12,714.33 was sustained by her on the sale of securities belonging to the estate of Marcus Cohn, deceased. Said error was cor-

rected by said taxpayer in a letter to the State Tax Commission, dated June 17th, 1932, in which she set forth the fact that the error had been made and that the securities upon which said loss had been sustained belonged to her and not to the said estate.

Dated, Albany, N. Y., September 16, 1935.

Cohn & Cohn, Attorneys for Relator. John J. Bennett, Jr., Attorney General, Attorney for Respondents.

[fol. 26] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

RETURN OF STATE TAX COMMISSION

The respondents above named, obedient to an order and writ of certiorari granted herein by Mr. Justice Sidney F. Foster on the 30th day of August, 1935, hereby make return thereto consisting of all singular the proceedings, decisions and actions of the respondent State Tax Commission, had and made in the premises, together with the records in the proceedings had before them on the hearing in this matter, including the transcript of the testimony had before said Commission, as follows:

(1) New York State income tax resident return for calendar year 1931, filed by Annie Cohn.

(2) New York State income tax resident return for the calendar year 1932, filed by Annie Cohn.

(3) Voucher for income tax refund, amount $25.24, representing apparent overpayment of tax.

(4) Claim for refund made by Annie Cohn, verified April 12, 1934, year for which claim was made 1931; amount claimed $792.89.

(5) Claim for refund made by Annie Cohn, verified April 12, 1934; year for which claim was made 1932; amount claimed $606.80.

[fol. 27] (6) Stipulation and statement of facts, bearing date September 16, 1935, entered into between Cohn & Cohn, Esqs., attorneys for relator, and Hon. John J. Bennett, Jr., Attorney General, attorney for respondents.

(7) Determination of State Tax Commission, bearing date September 12, 1935.

Respondents deny each and every allegation contained in the petition herein, except in so far as the same is shown to be true by this return.

Respondents respectfully allege that the taxes imposed upon the relator herein were justly and legally imposed pursuant to the laws of the State of New York.

In Witness Whereof, the State Tax Commission hereunto sets its hands and seals this 3rd day of October, 1935.

State Tax Commission, by Mark Graves, John J. Merrill, John P. Hennessey.

[fol. 28] In Supreme Court of New York, Albany County

Stipulation as to Record

It is Hereby Stipulated and Agreed by and between the parties above named that the individual returns of the relator for the years 1931 and 1932, set forth in the return of the respondents, the State Tax Commission of the State of New York, the information returns of "Annie Cohn, Executrix of Marcus Cohn Estate, 112 Ellison Street, Paterson, N. J.", for the years 1931 and 1932, which were made a part of the Stipulation and Statement of Facts dated September 16th, 1935, and the Will of Marcus Cohn, deceased also made a part of said stipulation and Statement of Facts, be omitted from the printed case, in view of the fact that all of the essential statements thereof are set forth in the said Stipulation and Statement of Facts.

It is Further Stipulated and Agreed that the voucher for the income tax refund, $25.24, paid to the relator, and made a part of the said return, be omitted from the printed case; and that the letters, Schedules "A," "B" and "C" set forth in the relator's petition for Writ of Certiorari, be incorporated in the agreed Statement of Facts.

Dated, October 18th, 1935.

Cohn & Cohn, Attorneys for Relator. John J. Bennett, Jr., Attorney General, Attorney for Respondents.

[fols. 29-30] EXHIBIT 1

Letter of State Tax Commission to Cohn & Cohn, dated July 24, 1935.
(Printed as Schedule "A" attached to Petition at p. 7.)

EXHIBIT 2

Letter of State Tax Commission to Cohn & Cohn, dated May 14, 1934.
(Printed as Schedule "B" attached to Petition at p. 8.)

EXHIBIT 3

Letter of State Tax Commission to Cohn & Cohn, dated January 21, 1935.
(Printed as Schedule "C" attached to Petition at p. 9.)

EXHIBIT 4

Claim for Refund for year 1931.
(Printed as Schedule "D" attached to Petition at pp. 10-12.)

EXHIBIT 5

Claim for Refund for year 1932.
(Printed as Schedule "E" attached to Petition at pp. 12-14.)

[fol. 31] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

Present: Honorable James P. Hill, Presiding Justice; Honorable Leon C. Rhodes, Honorable John C. Crapser, Honorable F. Walter Bliss, Honorable Christopher J. Heffernan, Associate Justices.

THE PEOPLE OF THE STATE OF NEW YORK Upon the Relation of ANNIE COHN, Relator,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners Constituting the State Tax Commission of the State of New York, Respondents.

ORDER OF ANNULMENT

The relator, Annie Cohn, having applied to this Court for the review by certiorari of a determination of the State Tax Commission denying the application of said relator for refunds of income taxes for the years 1931 and 1932 in the amounts of Seven hundred ninety-two and 89/100 ($792.89) [fol. 32] Dollars and Five hundred eighty-one and 56/100 ($581.56) Dollars, respectively, as erroneously paid and illegally collected, the said amounts representing the tax on rents derived by the relator from lands or interest in lands and from investments with a situs in the State of New Jersey, and the said proceeding having duly come on to be heard at the Term of this Court, commencing on the 14th day of January, 1936, and after hearing Maurice Cohn, of counsel for said relator, in support of said application, and Joseph M. Mesnig, of counsel for the respondents, in opposition thereto, and due deliberation having been had, it is hereby

Ordered, adjudged and decreed that the determination of the State Tax Commission be and the same hereby is annulled, Mr. Justice Leon C. Rhodes dissenting and voting to confirm, and that relator recover Fifty ($50.00) Dollars costs and her disbursements in this proceeding, and that said relator have execution therefor.

John S. Herrick, Clerk.

[fol. 33] In Supreme Court of New York, Appellate Division, Third Judicial Department

Decision Handed Down —— —, ——

48-22

The People of the State of New York ex Rel. Annie Cohn, Relator,

v.

Mark Graves and Others, as Commissioners, Constituting The State Tax Commission of the State of New York, Respondents

Decision

Determination annulled, with fifty dollars costs and disbursements.

Opinion by Hill, P. J.

Crapser, Bliss and Heffernan, JJ., concur.

Rhodes, J., dissents and votes to confirm.

[fol. 34] 48/22

In Supreme Court of New York, Appellate Division, Third Department

The People of the State of New York upon the Relation of Annie Cohn, Relator,

against

Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York, Respondents

Argued, January Term, 1936. Decided —— —, 1936

Hill, P. J., Rhodes, Crapser, Bliss, Heffernan, A. JJ.

Review of determination of the State Tax Commission under a Writ of Certiorari.

Cohn & Cohn, attorneys for relator, (Maurice Cohn, of counsel) New York City.

John J. Bennett, Jr., Attorney General, Attorney for Respondents (Joseph M. Mesnig, Assistant Attorney General, of counsel) Albany, N. Y.

OPINION TO ANNUL

HILL, P. J.:

The State Tax Commission has assessed an income tax against the relator, a resident of New York State, on account of rentals and income which she received from real [fol. 35] property situate in New Jersey. A petition for a refund made as prescribed in the Tax Law, has been denied by the Commission. That determination comes before our court for review under a writ of certiorari. The identical question now presented has been decided in this court, and adversely to the Commission's determination (Pierson v. Lynch, et al., 237 A. D. 763; affirmed without opinion, 263 N. Y. 533; writ of certiorari dismissed as improvidently granted, 293 U. S. 52).

The fact that the statute which authorized the tax (§ 359, Tax Law) has been amended since the decision in the Pierson case is without significance, as we decided that case solely upon the ground that under the Fourteenth Amendment to the Federal Constitution it was not within the power of a state, irrespective of the wording of the statute, to tax a resident of the state on account of rentals or income received from land located beyond its borders. The 1935 amendment (Chap. 933, Laws 1935) only makes more definite and certain the meaning which we gave Section 359 in deciding the Pierson case, and does not detract from the force of that authority.

Further citation of authority may be cumulative, as the Pierson case is a direct authority, decided first in this court and unanimously affirmed without opinion in the Court of Appeals. However, as the Supreme Court of the United States, in a later case has re-applied the law as it had been settled earlier, and as it was applied in the Pierson case, a brief examination of the more recent case (Senior v. [fol. 36] Braden, et al., 295 U. S. 422) may be proper. There, "The Ohio General Code provided that all investments and other intangible property of persons residing within the state should be subject to taxation" (p. 427).

"Appellant owned transferable certificates showing that he was a beneficiary under seven separate declarations of trust, and entitled to stated portions of rents derived from specified parcels of land—some of them within Ohio and some without" (p. 428). The taxing officials threatened to assess the income which the appellant received upon these declarations of trust. He instituted a suit to restrain the collection of the tax upon the ground that the Ohio Statute was unconstitutional under the Fourteenth Amendment. The opinion states: "With commendable frankness, counsel admit that under the Fourteenth Amendment, the state has 'no power to tax land or interests in land situate beyond its borders;' * * * Consequently they say 'if the property of the appellant, which the appellees seek to tax in this case, is land or interest in land situate * * * without the state, their action is unconstitutional and should be permanently enjoined.'"

In the Senior case, there were four parcels of land outside Ohio to which separate declarations of trust applied. The attorney for the Ohio taxing officials recognized, as it was recognized by us in the Pierson case, that the law was settled, and conceded, inter alia, that the state had no power to tax land or interests in land situate beyond its borders. The court applied that rule. The opinion quite largely [fol. 37] dealt with the subject of whether the land trust certificates were interests in land. It was determined that they were, and the court restrained the enforcement of the tax upon the ground that the state had no power to tax land or interest in land situate beyond its borders, and that a tax upon the income from land was tantamount to a tax upon the land.

The determination should be annulled, with fifty dollars costs and disbursements.

IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

[Title omitted]

NOTICE OF APPEAL TO COURT OF APPEALS

SIRS:

Please Take Notice that the above named Respondents hereby appeal to the Court of Appeals of the State of New

York from the final order of the Appellate Division of the State of New York, Third Judicial Department, entered in [fols. 38-39] the office of the Clerk of Albany County on or about the 14th day of March, 1936, which said final order annulled a determination of the State Tax Commission made herein on or about the 12th day of September, 1935, and the said Respondents appeal from each and every part of said order.

Dated, Albany, New York, March 20, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office & Post Office Address, The Capitol, Albany, N. Y.

To Cohn and Cohn, Esqs., Attorneys for Relator, 2 Rector Street, New York, N. Y. John A. Knox, Esq., County Clerk of Albany County, Court House, Albany, N. Y.

[fol. 40] In Court of Appeals of New York

The People of the State of New York upon the Relation of Annie Cohn, Relator-Respondent,

against

Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York, Respondents-Appellants

Opinion—Filed September 22, 1936

Crane, Ch. J.:

Rents from real property located in New Jersey, as well as interest from mortgages on similar property is, in my opinion, taxable income when received by a resident of this State. The tax upon such income is not a tax on the New Jersey real estate. The Pollock case (Pollock v. Farmers' Loan and Trust Co., 157 U. S. 429) has not decided otherwise and should not be pushed to cover this point. Many cases have gone through the courts since that decision explaining and clarifying its limitations. What may be a "direct" tax under the Federal Constitution may be income (as it really is) for other purposes.

The order of the Appellate Division should be reversed and the determination of the State Tax Commission affirmed, with costs in this court and in the Appellate Division. A question under the Federal Constitution was presented and necessarily passed upon by this court, viz.: Is section 359 of the Tax Law of the State of New York, as amended by chapter 933, Laws of 1935, in so far as it imposes an income tax upon rents received by a resident of [fol. 41] this State from real property located in a foreign State repugnant to, and violative of any provision of the Constitution of the United States. This court held the sections of said Tax Law herein involved to be a valid exercise of legislative power.

DISSENTING OPINION

HUBBS, J. (dissenting):

The relator, Annie Cohn, during the years 1931 and 1932, while a resident of this State, received, as the beneficiary of a life estate created by the will of her deceased husband, certain income, part of which was derived from rents from real estate located in the State of New Jersey and part from interest on bonds and mortgages upon real property located in that State. There were three executors of the will, two of whom resided in New Jersey and relator who resided in this State. The executors qualified in the State of New Jersey. Since 1913 they have been functioning in that State and the office of the estate is and always has been in the City of Paterson, where the securities are kept in a bank. The executors have managed the estate property, collected rents and income from bonds and mortgages, and made repairs to the real property.

The relator filed a State income tax return showing income received from the estate, consisting of rents from certain specified real properties located in New Jersey and interest on mortgages covering real property in that State. She paid an income tax on such income. Thereafter she made application for refund of the taxes paid, as erroneously paid or illegally collected, her contention being that this State was without power to tax either the rental income derived from real property located without the State or [fol. 42] the income from bonds and mortgages upon real property located without the State, where the situs of such

intangibles was likewise without the State. In making the application for refund, the appellant relied upon Matter of Pierson v. Lynch (237 App. Div., 763; affd. 263 N. Y. 533). The appeal in that case was dismissed by the United States Supreme Court.

The Legislature amended the Tax Law (Cons. Laws, ch. 60) by chapter 933 of the Laws of 1935, and provided that the rental income derived by a resident of New York State from real property located without the State constituted taxable income. The law was made retroactive to January 1, 1919.

The relator's claims for refund were denied. This proceeding was thereupon instituted. The Appellate Division decided that the identical question presented had been decided in Matter of Pierson v. Lynch (supra); that the fact that the statute which authorized the tax, Section 359 of the Tax Law, has been amended since the decision in the Pierson case is without significance as that case was decided solely upon the ground that under the Fourteenth Amendment to the Federal Constitution it was not within the power of a State to tax a resident of the State on account of rentals or income received from land located beyond its borders. Reference was also made to the determination of the Supreme Court of the United States in Senior v. Braden (295 U. S. 422).

Upon this appeal the State Tax Commission contends, despite the determination of this court in the Pierson case and despite the decision of the United States Supreme [fol. 43] Court in Pollock v. Farmers' Loan & Trust Co. (157 U. S. 429), which latter case held in effect that a tax upon the income from real property was the same in substance as a tax on the real property, that the rents and mortgage interest derived from real property located without the State received by a resident of this State are properly subject to the New York personal income tax law.

It would be impossible, without squarely receding from the position taken in the Pierson case, to hold that income represented by rentals from real property located in another State may be included as part of the owner's income for the purpose of computing the owner's income tax in this State. We believe that case was correctly decided. The only difference in the facts of the two cases is that in the Pierson case title to the real property appears to have been

in the recipient of the income in her individual name, whereas in the present case the recipient of the income had only a life interest in the property. This slight difference in the facts of the two cases is not urged as a ground for the application of a different rule and, of course, could not be urged as such a ground, since the question involved is based upon the broad ground of whether the income tax is such a tax as may not be imposed by one State upon real property and tangible personal property located in another. The argument of the Tax Commission is, in substance, that the decision in Matter of Pierson v. Lynch (supra) was based upon the decision of the Supreme Court of the United States in the Pollock case and that, as a matter of fact, the decision in the Pollock case has no bearing upon the point at issue here. The tax involved in the Pollock case was an annual tax levied by the Congress of the United States on the income of persons and corporations. It was decided that a tax on the rents or income of real estate is a direct [fol. 44] tax within the meaning of the Constitution of the United States which, by the third clause of Section 2, Article I, requires that direct taxes shall be apportioned among the several States and that since the income tax law under consideration did not provide apportionment of the tax collected and the tax was a direct tax, the act was in violation of the United States Constitution and to the extent that it levied a tax on the rents or income of real estate was invalid. The determination in the Pollock case has been repeatedly stated to have amounted to a holding upon the constitutional meaning of the word "direct"—that is, that a tax on income from real property amounts in effect to a direct tax upon the property (Knowlton v. Moore, 178 U. S. 41; Flint v. Stone Tracy Co., 220 U. S. 107; McCoach v. Minehill R'y, 228 U. S. 295).

In the Pollock case the question involved was as to the validity of the act of Congress as construed in the light of the Federal Constitution, whereas in the instant case we are concerned with the effect of a tax imposed by the State in view of the provision of the Federal Constitution. There seems to be nothing in the late decisions of the United States Supreme Court which detracts from the effect of its decision in the Pollock case that a tax upon the income from real property is a direct tax and equivalent to a tax upon the property itself.

In Senior v. Braden (supra) the State of Ohio taxed transferable certificates under declarations of trust entitling the holders to a portion of rents from specific parcels of real estate, some within the State of Ohio, some in other states. It was conceded that under the Fourteenth Amendment the State had no power to tax land or inter- [fol. 45] ests in land beyond its borders, and that if the certificates constituted interests in land, the tax would be unconstitutional and void. It was decided that a tax in Ohio on the certificates was void. It appeared that each parcel of land covered by the certificates was taxed in the State where located. In each the trustee held and managed the property for the use and benefit of the certificate holders and distributed the rents and proceeds of sales. Each certificate holder was said to hold a beneficial interest in the trust of each parcel, and the trustee was free from the control of the certificate holders. The state contended that the interest of a certificate holder was a species of intangible personal property entitling the holder to a pro rata distribution of income and proceeds of sales; that the certificate was the evidence of the holder's interest in land, legal title of which the trustee held. The court held the certificate holders had interests in and to the property which were more than a bare right and much more than a choice in action, citing and quoting from Brown v. Fletcher (235 U. S. 589). The dissenting opinion of Mr. Justice Stone indicates that he understood the prevailing opinion to hold that a State could not tax the income from real property located in another State. The court decided that the same rule applied under the State statute as under the United States statute, thereby extending the rule of the Pollock case and making it applicable under a State statute. Although that case did not involve an income tax statute, it did involve a tax under the investments measured by the income.

As land in another State cannot be taxed against the owner in this State, and a tax upon the income from real property is a tax upon the real property itself, it follows that the tax assessed in the case at bar on the rents received was illegal. It was also illegal as constituting double tax- [fol. 46] ation for the reasons hereinafter stated.

There remains the question as to whether the income from bonds and mortgages is likewise entitled to be ex-

empted from the application of the State income tax. In considering that question, it is to be borne in mind that the property upon which the mortgages exist is wholly without the State of New York, and, further, that the evidences of the indebtedness, that is, the bonds and mortgages, are likewise without the State. Furthermore, they are a part of an estate administered by the executors in a measure as a business in the State of New Jersey. The income results from the investment of funds of the estate, the supervision of those investments, and the activity of the executors in collecting the income. The court below seems to have treated the income from mortgages on the real property under the same category as rentals. That type of income was not involved in Matter of Pierson v. Lynch (supra). Mortgage interest is not compensation for the use of real property but rather compensation for the use of money. That is, it constitutes compensation for a loan of money or forbearance on an indebtedness. The debt is not tangible and the mortgage upon the real property is only collateral security for the intangible. If it were necessary to construe the decision in this case as a determination that a tax upon mortgage interest is a direct tax on the land, there would be difficulty in sustaining the decision in so far as that type of income is concerned. However, the courts have gone much further and have held that where intangible as well as tangible property has acquired a business situs in another State, taxation thereof by the State other than the State in which it had acquired a business situs would violate the due process clause of the Fourteenth Amendment of the United [fol. 47] States Constitution and constitute double taxation. In New Orleans v. Stempel, (175 U. S. 309) the defendant in error, domiciled in New York, was the owner of credits evidenced by notes largely secured by mortgages on real property in New Orleans. The notes and mortgages were in the City of New Orleans in the possession of an agent of the defendant in error. The agent collected the interest and principal as it became due and deposited the same in a bank in New Orleans. The question involved in that case was as to whether the property in the hands of the agent was subject to taxation in New Orleans. It was held that such taxation did not infringe any rights secured by the Federal Constitution. It was said that when an indebtedness has taken a concrete form and become evidenced by note, bill,

mortgage or other written instrument, and the written instrument evidencing the indebtedness is left within the State in the hands of an agent of the non-resident owner to be by the agent used for the collection and deposit or reinvestment within the State, its taxable situs is in the State (De Ganay v. Lederer, 250 U. S. 376.)

It seems to be quite clear that property, consisting of bonds, mortgages and similar evidences of indebtedness, is taxable in the State where they are physically located if they are there, as in this case, for the purpose of collection of principal and interest and for management by an agent within the State. For the purposes of taxation, the intangible debt, when represented by something of a concrete nature such as a bond or mortgage, becomes in the nature of a tangible item of property at the business situs (De Ganay v. Lederer, supra; Hill v. Carter, 47 Fed. Rep. (2d) 869; Opinion of the Justices, 84 N. H. 559; Harrison v. Commissioner of Corporations and Taxations, 272 Mass. 422).

[fol. 48] The same principle applies to tangible personal property. (Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194; Frick v. Pennsylvania, 268 U. S. 473; see, also, Senior v. Braden, supra.)

Maquire v. Trefry (253 U. S. 12) was at one time direct authority for holding that the income from the bonds and mortgages on real property situate in New Jersey is taxable in this State. The United States Supreme Court has, however, departed from the rule stated in that case. (Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204).

In Senior v. Braden (supra, p. 432) the court said that the views expressed in the Maguire case "are not in harmony with Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, and views now accepted here in respect of double taxation."

If the decision in the Maguire case is in conflict with the present views of the United States Supreme Court, it necessarily follows that under the decision of that court, the income from the New Jersey bonds and mortgages is not subject to the payment of an income tax in this State. In the case of Union R. T. Co. v. Kentucky (supra) it was definitely decided that a State could not tax tangible property permanently situated outside of the State or domicile of the owner and used there in the owner's business. Later the court extended the principle to intangibles in order to

eliminate unjust double taxation, stating in effect that it is no more possible for an intangible to have a legal status in two places at the same time than it was possible for a tangible to be in two places at the same time. (First Nat. Bank v. Maine, 284 U. S., 312; Baldwin v. Missouri, 281 U. S., 586; Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83). [fols. 49-50] While there has been a sharp conflict among the members of the United States Supreme Court on the subject, and its earlier decisions are, in certain instances, in conflict with its later decisions, still we understand the late decisions to mean that double taxation is illegal and that the income from securities which have a taxable situs in one State cannot be legally taxed in another State. The decisions of that court are binding upon us on the questions here involved and should be strictly followed.

As the property from which the relator's income was derived had a business situs in New Jersey and was taxable there, the income therefrom cannot be taxed in this State. The order of the Appellate Division should be affirmed, with costs.

Lehman, Crouch and Finch, JJ., concur with Crane, Ch. J.; Hubbs, J., dissents in opinion, in which O'Brien and Loughran, JJ., concur.

Order granted.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 51] In Court of Appeals of New York

[fol. 52] The People, etc., ex Rel. Annie Cohn,
Respondent,

ag'st

Mark Graves & Ors., as Commissioners constituting the State Tax Commission of the State of New York, Appellants

Remittitur—July 8, 1936

Be it Remembered, That on the 13th day of April, in the year of our Lord one thousand nine hundred and thirty-six, Mark Graves and others, as commissioners, &c., the appellants in this cause, came here into the Court of Ap-

peals, by John J. Bennett, Jr., Attorney General, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And Annie Cohn, the respondent in said cause, afterwards appeared in said Court of Appeals by Cohn & Cohn, her attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Joseph M. Mesnig, of counsel for the appellants; and by Mr. Maurice Cohn, of counsel for the respondent; and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be, and the same hereby is reversed and determination of State Tax Commission affirmed, with costs in this court and in the Appellate Division.

[fol. 53] A question under the Federal Constitution was presented and necessarily passed upon by this court, viz: Is Section 359 of the Tax Law of the State of New York, as amended by Chapter 933, Laws of 1935, in so far as it imposes an income tax upon rents received by a resident of this State from real property located in a foreign State repugnant to, and violative of, any provision of the Constitution of the United States. This Court held the sections of said Tax Law herein involved to be a valid exercise of legislative power.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore, it is considered that the said order of Appellate Division be reversed and determination of State Tax Commission affirmed, with costs in this court and in the Appellate Division &c, &c, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be

enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

[fol. 54] COURT OF APPEALS

Clerk's Office

Albany, July 8th, 1936.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

Clerk's certificate to foregoing paper omitted in printing.

[fol. 54½] SIR:

Take notice that the within is a copy — Remittitur duly filed and entered in the office of the Clerk of Albany County, on the 14th day of July, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office and Post Office Address, Capitol, Albany, N. Y.

To Cohn and Cohn, Esqs., Attorney for Relator, 39 Broadway, New York, N. Y.

[fol. 55] IN SUPREME COURT OF NEW YORK, ALBANY COUNTY

[Title omitted]

ORDER ON REMITTITUR—Filed July 14, 1936

The respondents above named having appealed to the Court of Appeals from a final order of the Appellate Division, Supreme Court, Third Department, in the above entitled proceeding, entered in the office of the Clerk of Albany County on or about the 14th day of March, 1936, which said order annulled a determination of the respondent State Tax Commission made herein on or about the 12th day of September, 1935, and the said appeal having

been duly argued before the Court of Appeals, and after due deliberation had thereon the Court of Appeals having made its decision and having ordered and adjudged that the order of the Appellate Division, Supreme Court, Third Department, so appealed from be reversed and the determination of the State Tax Commission affirmed with costs in the Court of Appeals and in the Appellate Division, and [fol. 56] the Court of Appeals having certified that a question under the Federal Constitution was presented and necessarily passed upon by the Court of Appeals, viz.:

"Is Section 359 of the Tax Law of the State of New York, as amended by Chapter 933, Laws of 1935, in so far as it imposes an income tax upon rents received by a resident of this State from real property located in a foreign State repugnant to, and violative of any provision of the Constitution of the United States. This court held the sections of said Tax Law herein involved to be a valid exercise of legislative power."

and having further ordered that the proceedings and record herein be remitted to the Supreme Court, there to be proceeded upon according to law,

Now, on reading and filing the remittitur from the Court of Appeals herein, and upon motion of John J. Bennett, Jr., Attorney-General of the State of New York, attorney for the above named respondents, it is

Ordered, That the said order and judgment of the Court of Appeals be, and the same hereby are, made the order and judgment of this Court, and it is further

Ordered, That the respondents have judgment against Annie Cohn, the relator herein, for their costs and disbursements in the Court of Appeals and in the Appellate Division, to be taxed.

Gilbert V. Schenck, Justice of the Supreme Court.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 56½] SIR:

Take notice that the within is a copy of Order duly filed and entered in the office of the Clerk of Albany County, on the 14 day of July, 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for Respondents, Office and Post Office Address, Capitol, Albany, N. Y.

To Cohn and Cohn, Esqs., Attorney- for Relator, 39 Broadway, New York, N. Y.

[fol. 57] In Supreme Court of New York, Albany County

The People of the State of New York upon the Relation of Annie Cohn, Relator,

against

Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York, Respondents

Judgment—Filed August 18, 1936

The respondents above named having appealed to the Court of Appeals from a final order of the Appellate Division, Supreme Court, Third Department, in the above entitled proceeding, entered in the office of the Clerk of Albany County on or about March 14, 1936, which said order annulled a determination of the respondent State Tax Commission made on or about September 12, 1935; and the Court of Appeals having ordered and adjudged that the order of the Appellate Division, Supreme Court, Third Department so appealed from be reversed and the determination of the State Tax Commission affirmed with costs in the Court of Appeals and in the Appellate Division, and having further ordered that the proceeding and record herein be remitted to the Supreme Court, there to be proceeded upon according to law;

And the remittitur of the Court of Appeals and the order thereon having been duly filed in the office of the Clerk of Albany County on July 14, 1936, and the petitioner's costs having been duly taxed on August 18, 1936, in sum of $213.31,

Now, on motion of John J. Bennett, Jr., Attorney-General, and attorney for the State Tax Commission, it is

Ordered and Adjudged that the order of the Appellate Division appealed from be and the same hereby is reversed and the determination of the State Tax Commission affirmed [fol. 58] with costs in Appellate Division and Court of Appeals, and that the respondent State Tax Commission recover from the relator herein the sum of $213.31 costs, as

taxed, and that the said State Tax Commission have execution therefor.

Judgment signed and entered this 18 day of August, 1936.

John A. Knox, Albany County Clerk.

Clerk's certificate to foregoing paper omitted in printing.

[fols. 58½-63] SIR:

Take notice that the within is a copy of Judgment duly filed and entered in the office of the Clerk of Albany County, on the 18th day of August 1936.

Yours, etc., John J. Bennett, Jr., Attorney-General, Attorney for —, Office and Post Office Address, Capitol, Albany, N. Y.

To —— ——, Attorney for —.

[fol. 64] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed September 12, 1936

To the Honorable Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York:

Annie Cohn, your petitioner, who is the relator-respondent in the above entitled cause, considering herself aggrieved by the order and judgment of the Supreme Court of the State of New York, Albany County, entered upon the remittitur and the final decision of the Court of Appeals of the State of New York, handed down July 8th, 1936, in this cause, which said Court is the highest Court of the State of New York in which a decision in this suit and matter could be had, hereby prays that an appeal by your petitioner be allowed herein to the Supreme Court of the United States for the reasons specified in the assignment of errors hereinafter set forth, to the end that said order and judgment entered in this cause on the 14th day of July, 1936, and on the 18th day of August, 1936, respectively, and the decision of the said Court of Appeals, upon

which the same were entered, may be there reviewed and considered and justice done your petitioner, and that an order be made allowing such appeal, and fixing the amount [fol. 65] of bond required of the petitioner herein on such appeal, which shall operate as a supersedeas.

ASSIGNMENT OF ERRORS

The petitioner Annie Cohn assigns the following errors in the record and proceeding in the said case:

The Court of Appeals erred:

1. In holding that Section 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, in so far as it imposes an income tax upon rents received by (or credited to the account of) a resident of this State from real property located in a foreign state, is not violative of or repugnant to the Fourteenth Amendment of the Constitution of the United States.

2. In holding that Section 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, in so far as it imposes an income tax upon interest received by (or credited to the account of) a resident of this State from bonds and mortgages physically located in and covering real estate in the State of New Jersey, and which bonds and mortgages have a situs in the State of New Jersey, does not contravene the Fourteenth Amendment to the Federal Constitution.

3. In holding that Section 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, in so far as the following provision thereof, i. e., "Sec. 2. This Act shall be retroactive to January first, nineteen hundred and nineteen", is not violative of or repugnant to the Constitution of the United States, and particularly the Fourteenth Amendment thereof; in failing to hold that said retroactive provision is arbitrary, unreasonable and unjust.

[fol. 66] 4. In applying the principles laid down in Pollack v. Farmers' Loan & Trust Company, 157 U. S. 429, s. c. 158 U. S. 601, to the instant case. (Said case held that an income tax is a direct tax, and that a tax on rents from real property is in substance and effect a tax upon the property itself.)

5. In reversing the Order of the Appellate Division and affirming the Determination of the State Tax Commission of the State of New York.

6. In holding that Sec. 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, does not violate the Fourteenth Amendment to the Federal Constitution, in that its operation does not constitute double or multiple state taxation.

A Review Could Have Been Had on Writ of Error Under Legislation in Force January 31, 1928

Pursuant to Rule 46 (2) of the United States Supreme Court, your petitioner shows that this case is one in which, under the legislation in force when the Act of January 31, 1928, was passed, a review could be had in the Supreme Court of the United States on writ of error.

The Legislation in force conferring jurisdiction on the Supreme Court of the United States to review a judgment such as the one at bar on writ of error prior and up to January 31, 1928, follows:

The Act of Congress of February 13, 1925, Chap. 229, Sec. 1, 43 Stat. 936, effective May 13, 1925, amending and re-enacting Sec. 237 (a) of the Judicial Code (U. S. Code Annotated, Title 28, Sec. 344) provides:

"A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be [fol. 67] had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the Court from which it was removed by the writ."

Prayer for Reversal

Because of the foregoing errors, your petitioner prays that the said order and judgment of the Supreme Court

of the State of New York, and that the decision of the Court of Appeals of the State of New York, upon which said order and judgment were entered, in the above-entitled cause, be reviewed by the Supreme Court of the United States and reversed and judgment rendered in favor of petitioner, with costs in all courts.

Dated: September 2nd, 1936.

David Cohn, Maurice Cohn, Counsel for Petitioner, 39 Broadway, New York, N. Y. Randolph E. Paul, Esq., Watson Washburn, Esq., Of Counsel.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 68] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL—Filed September 12, 1936

The relator-respondent in the above-entitled suit, having prayed for the allowance of an appeal herein to the Supreme Court of the United States, from the order and judgment of the Supreme Court of the State of New York, entered in the office of the Clerk of Albany County on July 14, 1936, and August 18, 1936, respectively, upon the remittitur and final decision of the Court of Appeals of the State of New York, handed down July 8, 1936, and having presented and filed her petition for appeal, assignment of errors, prayer for reversal, and statement as to jurisdiction on appeal, pursuant to the statutes of the United States and the Rules of the Supreme Court of the United States, it is

Ordered that an appeal be and the same hereby is allowed to the Supreme Court of the United States as provided by law; and it is further

Ordered that the Clerk of the Supreme Court of the State of New York, County of Albany, to which Court the record herein has been remitted, shall prepare and certify a transcript of the record, proceedings, order and judg-
[fol. 69] ment in this cause and transmit the same to the Supreme Court of the United States, so that the transcript shall reach said Court within forty days of the date of this order; and it is further

Ordered that, pending the final determination by the Supreme Court of the United States of the Appeal hereby allowed, the respondents-appellants in the above entitled cause, be, and they hereby are stayed and restrained from instituting any proceeding or bringing any action to execute, carry out or enforce the order and judgment entered herein; and it is further

Ordered that security for costs herein be fixed in the sum of Five Hundred ($500.00) dollars.

Dated September 2nd, 1936.

Frederick E. Crane, Chief Judge of the Court of Appeals of the State of New York.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 70] Bond on appeal for $500.00, approved and filed September 12, 1936, omitted in printing.

[fols. 71-72] Citation, in usual form, showing service on John J. Bennett, Jr., filed September 12, 1936, omitted in printing.

[fol. 73] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO TRANSCRIPT OF RECORD—Filed September 15, 1936

It is hereby stipulated between appellant and appellees herein, by their respective counsel, and the said counsel hereby indicate as the portions of the record to be included in the transcript herein pursuant to Rule 10 of the Rules of the Supreme Court of the United States, the following papers:

Notice of application for a writ of certiorari, Orig. Record, p. 2.

Petition for an order that a writ of certiorari issue, Orig. Record, pp. 3, 4, 5 and 6.

Schedules "A", "B", "C", "D", "E", annexed to foregoing petition, Orig. Record, pp. 7, 8, 9, 10, 11, 12, 13 and 14.

Determination, Orig. Record, pp. 15 and 16.

Order that writ of certiorari issue, Orig. Record, p. 17.

Writ of certiorari, Orig. Record, pp. 18 and 19.

Stipulation and Statement of facts, Orig. Record, pp. 20, 21, 22, 23, 24 and 25.

Return of State Tax Commission, Orig. Record, pp. 26 and 27.

[fols. 74-75] Stipulation dated October 18, 1935, Orig. Record, p. 28.

Exhibits 1, 2, 3 and 4 and 5, Orig. Record, p. 29.

Order of Annulment, Orig. Record, pp. 31 and 32.

Decision of Appellate Division, Orig. Record, p. 33.

Opinion of Hill, P. J., Orig. Record, pp. 34, 35, 36 and 37.

Notice of Appeal to Court of Appeals, Orig. Record, pp. 37 and 38.

Decision of The Court of Appeals.

Opinion of Crane, Ch. J.

Dissenting Opinion of Hubbs, J.

Remittitur of Court of Appeals.

Order of Supreme Court entered upon Remittitur.

Judgment of the Supreme Court.

Petition for appeal, assignment of errors, and prayers for reversal.

Statement as to Jurisdiction.

Order allowing the appeal.

Undertaking for costs.

Citation.

Proof of service of petition for and Order allowing appeal, assignment of errors, statement as to jurisdiction and statement directing attention to provisions of paragraph 3, Rule 12 of Rules of the United States Supreme Court.

Stipulation as to transcript of Record.

Statement directing attention to the provisions of par. 3, Rule 12 of the Revised Rules of the U. S. Supreme Court Rules.

Dated September 8th, 1936.

David Cohn, Maurice Cohn, Counsel for Appellant.
John J. Bennett, Jr., Attorney for Appellees.
Joseph N. [Signature illegible], Counsel for Appellees.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 76] SUPREME COURT OF THE UNITED STATES

NOTICE

SIR:

Please Take Notice that the within is true copy of the appellant's statement of points to be relied upon, and designation of the parts of the record to be printed.

Dated New York, N. Y., September 25, 1936.

Yours respectfully, Maurice Cohn, Counsel for Apellant, Office & P. O. Address, 39 Broadway, New York, N. Y.

To Hon. John J. Bennett, Jr., Counsel for Appellees, Department of Law, The Capitol, Albany, New York.

[fol. 77] SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed September 26, 1936

Comes now the appellant in the above entitled cause and states that the points upon which she intends to rely herein are the same as the six items listed in the assignment of errors heretofore filed.

And the appellant further states that she considers that the parts of the record necessary for the consideration of this cause are all the same parts listed in the stipulation as to transcript of record heretofore filed herein and therein included as the portion of the record to be included in said transcript.

Dated, New York, N. Y., September 25, 1936.

Maurice Cohn, Counsel for Appellant.

[fol. 78] STATE OF NEW YORK,
County of New York, ss:

Maurice Cohn, being duly sworn, deposes and says:

I am over the age of 21 years; that on the 25th day of September, 1936, I served the annexed statement of points to be relied upon, and designation of the parts of the record to be printed, pursuant to paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, upon

Honorable John J. Bennett, Jr., counsel for the appellees herein, by depositing in a United States post office a copy of said statement and designation securely enclosed in a sealed and postpaid wrapper, addressed to the said Honorable John J. Bennett, Jr., at the Department of Law, the Capitol, Albany, New York.

Deponent further states that he caused the said sealed and postpaid wrapper so addressed to be sent by registered mail and that in the usual course of delivery, said statement and designation will be delivered to the said addressee on September 26th, 1936.

Maurice Cohn.

Sworn to before me this 25th day of September, 1936. Mildred E. Willner, Commissioner of Deeds. N. Y. Co. Clk's No. 97, Reg. No. 38W7. Commission expires [Date illegible], 1937.

[fol. 79] [File endorsement omitted.]

Endorsed on cover: File No. 40,944. New York Supreme Court. Term No. 404. The People of the State of New York, ex rel. Annie Cohn, appellant, vs. Mark Graves, John J. Merrill, and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York. Filed September 26, 1936. Term No. 404, O. T., 1936.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 404

THE PEOPLE OF THE STATE OF NEW YORK
UPON THE RELATION OF ANNIE COHN,
Appellant,

against

MARK GRAVES, JOHN J. MERRILL AND JOHN P. HENNESSEY, AS COMMISSIONERS CONSTITUTING THE STATE TAX COMMISSION OF THE STATE OF NEW YORK,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION ON APPEAL.

Pursuant to Supreme Court Rule 12, Par. 1, Annie Cohn, the above appellant, files this, her statement, showing the basis on which said appellant contends that the Supreme Court has appellate jurisdiction to review on appeal the judgment appealed from herein, as follows:

I. The statute believed to sustain appellate jurisdiction is the Act of Congress of February 13, 1925, Chap. 229,

Sec. 1, 43 Stat. 936, effective May 13, 1925, amending and re-enacting Sec. 237 (a) of the Judicial Code (U. S. Code Annotated, Title 28, Sec. 344) provides:

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State Court, and may, in its discretion, award execution or remand the cause to the Court from which it was removed by the writ."

The Act of Congress of January 31, 1928, Chap. 14, Sec. 1, 45 Stat. 54, (U. S. C. A., Title 28, Sec. 861a,) provides:

> "That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

The Act of Congress of April 26, 1928, Chap. 440, 45 Stat. 466, amending Sec. 2 of the Act of Congress of January 31, 1928, hereinbefore cited, provide:

> "SEC. 2. The Statutes regulating the right to a writ of error defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

The Statute of the State, the Validity of Which is Involved.

II. The Statute of the State, the validity of which is involved in this case is Sec. 359 of the Tax Law of the State of New York, as amended by Chap. 933, Laws of 1935, page 1768, in so far as it imposes an income tax upon rents and income received by a resident of this State from real and personal property located and having a situs in a foreign State. Said Statute reads as follows:

SEC. 359. GROSS INCOME DEFINED.—"Includes gains, profits and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales or dealings in property, whether real or personal, *and whether situated within or without the state,* growing out of the ownership or use of or interest in such property; also from interest, rent (*including rent derived from real property situated outside the state*), dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, including gains or profits or income derived through estates or trusts by the beneficiaries thereof, whether as distributed or as distributable shares, *it being intended to include all the foregoing items, without regard to the source thereof, location of the property involved, or any other factor, except only a case where the inclusion thereof would be violative of constitutional restrictions.* The amount of all items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the methods of accounting permitted in this article, any such amounts are to be properly accounted for as of a different period; but,

SEC. 2. *This act shall be retroactive to January first, nineteen hundred nineteen.*

SEC. 3. "This act shall take effect immediately." (May 16, 1935.)

The matter in italics is new and was comprised in the Amendment of 1935, and is challenged in the instant case.

The following section, as amended by Chap. 35, Laws of 1935, page 395, (February 16, 1935) of the Tax Law of the State of New York is involved in the determination of the validity of the challenged statute:

> SEC. 351. IMPOSITION OF INCOME TAX.—"A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: * * *
>
> "A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state."

Date of Judgment and Order Sought to be Reviewed and Date of Application for Appeal.

III. The order and judgment of the Supreme Court of the State of New York, Albany County, sought to be reviewed herein were entered July 14, 1936, and August 18, 1936, upon the remittitur and the decision of the Court of Appeals of the State of New York, handed down July 8, 1936. On September 2, 1936, a petition for allowance of appeal to the Supreme Court of the United States was presented to Honorable Frederick E. Crane, Chief Judge of the Court of Appeals.

Nature of the Case, Basis of Jurisdiction, and Grounds Upon Which it is Contended the Questions Involved are Substantial.

IV. Annie Cohn, the appellant, during the years 1931 and 1932, while a resident of the State of New York, received

(or had credited to her account in New Jersey) as the beneficiary of a life estate created by the Will of her deceased husband, certain income, part of which was derived from rents from real estate located in the State of New Jersey, and part from interest on bonds and mortgages upon real property located in that State. There were three executors of the will (which had been probated in Passaic County, State of New Jersey in 1913) two of whom resided in New Jersey and appellant who resided in this State. The executors qualified in the State of New Jersey. Since 1913, they have been functioning in that State, and the office of the estate is, and always has been, in the City of Paterson, N. J., where the said securities were kept in a bank. The executors in New Jersey, acting as the agents of the life tenant, the said appellant, collected the rents, the interest and amortization payments on the bonds and mortgages, made re-investments and managed the property entirely in New Jersey.

The appellant filed New York State Income Tax Returns for the years 1931 and 1932, showing income received from the said Estate (or credited to her account) consisting of rents from certain specified real properties located in New Jersey and interest on mortgages covering real property in the State of New Jersey and having a situs in that State. Appellant paid income taxes on such income for the years 1931 and 1932. Thereafter she made application for refund of the taxes paid, as erroneously paid or illegally collected, her contention being that the State of New York was without power to tax either the rental income derived from real property located without the State, or the income from bonds and mortgages located without the State, where the situs of such intangibles was likewise without the State. Nor application for refunds was duly made in accordance with the law of said State, and in her application for refunds appellant relied upon the case of *Pierson* v. *Lynch*

(237 App. Div. 763, Aff'd, 263 N. Y. 533; writ of certiorari dismissed as improvidently granted, 293 U. S. 52).

The Legislature amended the Tax Law, May 16, 1935, (Cons. Laws, Chap. 60) by chapter 933 of the Laws of 1935, page 1768, and provided that the rental income derived by a resident of New York State from real property located without the State, and income from personal property with a situs outside of as well as within the State, constituted taxable income. The law was made retroactive to January 1, 1919.

The appellant's claims for refund were denied by the State Tax Commission, the appellees herein. A certiorari proceeding was thereupon instituted in the Supreme Court of the State of New York, Albany County, returnable before the Appellate Division, Third Department. Said Court (by a divided Court) decided that the identical question presented had been decided in matter of *Pierson* v. *Lynch* (*supra*); that the fact that the statute which authorized the tax, Sec. 359 of the Tax Law, had been amended since the decision in the *Pierson* case was without significance, as that case was decided solely upon the ground that under the Fourteenth Amendment to the Federal Constitution it was not within the power of a State to tax a resident of the State on account of rentals or income received from land located beyond its borders. A copy of the opinion is appended hereto. Reference was made by the Court to the determination of the Supreme Court of the United States in *Senior* v. *Braden* (295 U. S. 422).

Upon an appeal by the State Tax Commission, the appellee herein, the Court of Appeals of the State of New York, by a divided Court, rendered the following decision:

CRANE, *Ch. J.*:

"Rents from real property located in New Jersey, as well as interest from mortgages, on similar property,

is, in my opinion, taxable income when received by a resident of this state. The tax upon such income is not a tax on the New Jersey real estate. The Pollock case (Pollock *v.* Farmers' Loan & Trust Co., 157 U. S. 429) has not decided otherwise and should not be pushed to cover this point. Many cases have gone through the courts since that decision explaining and clarifying its limitations. What may be a "direct" tax under the Federal Constitution may be income (as it really is) for other purposes.

"The order of the Appellate Division should be reversed and the determination of the State Tax Commission affirmed, with costs in this court and in the Appellate Division. * * *"

The prevailing and dissenting opinions of the Court of Appeals are reported in 271 N. Y. 353; a copy thereof is appended hereto.

The Federal questions sought to be reviewed were first raised in the petition for writ of certiorari in the New York Supreme Court, Albany County (Orig. Record on Appeal, page 5). The petitioner, the appellant herein, averred in said petition that the determination of the State Tax Commission was erroneous and that the income taxes paid by her for the years 1931 and 1932 were erroneously and illegally collected; and that she was injured and aggrieved thereby on the ground that her income was from rents and mortgage interest from real estate situated in the State of New Jersey; and that such income was not legally taxable by the State of New York, and that said tax would be, in substance and effect, a tax upon real estate and tangible property situated outside the State of New York and would violate petitioner's rights under the Constitution of the United States and the Fourteenth Amendment thereof.

The validity of a law of the State of New York was formally drawn in question and the same was sustained by

the highest court of the State in which the decision in the suit could be had. The questions involved are substantial in that the legal power of one sovereign State to reach out and tax property having a situs beyond its borders in another sovereign State is involved; likewise the question of multiple State taxation; and also the right of a State to arbitrarily make a tax law retroactive for a period of over fifteen years. Appellant was injuriously affected thereby as her claims for refunds for the years 1931 and 1932, to which she was legally entitled under the existing law, were denied.

That the questions involved are substantial is manifest from the last two paragraphs of the dissenting opinion of Hubbs, J., in this case, in the Court of Appeals:

> "While there has been a sharp conflict among the members of the United States Supreme Court on the subject and its earlier decisions are, in certain instances, in conflict with its later decisions, still we understand the late decisions to mean that double taxation is illegal and that the income from securities which have a taxable situs in one State cannot be legally taxed in another State. The decisions of that court are binding upon us on the questions here involved and should be strictly followed.
>
> "As the property from which the relator's income was derived had a business situs in New Jersey and was taxable there, the income therefrom cannot be taxed in this State. The order of the Appellate Division should be affirmed, with costs."

The opinion of the Court of Appeals stated that a question under the Federal Constitution was presented and necessarily passed upon by said court, to wit:

> "Is section 359 of the Tax Law of the State of New York, as amended by Chapter 933, Laws of 1935,

in so far as it imposed an income tax upon rents received by a resident of this State from real property located in a foreign State repugnant to, and violative of, any provision of the Constitution of the United States. This Court held the sections of said Tax Law herein involved to be a valid exercise of legislative power."

Cases Believed to Sustain Jurisdiction.

V. Many cases could be cited by appellant to sustain the jurisdiction of this Court to review the final decision of the Court of Appeals in this cause. At the very outset, appellant invoked the guaranties given her by the Fourteenth Amendment to the Constitution of the United States. A substantial Federal question was presented and its decision was essential to the determination of the controversy and it was actually decided by the Court of Appeals of the State of New York adversely to the appellant.

The following cases in this Court are a few of the many which could be cited as sustaining the jurisdiction of this Court in this cause:

Miedreich v. *Lauenstein*, 232 U. S. 236 (1914);
Ward v. *Krinsky*, 259 U. S. 503, 510;
Blodgett v. *Silberman*, 277 U. S. 1 (1928);
Farmers' Loan & Trust Co. v. *Minn.*, 280 U. S. 204;
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83;
Baldwin v. *Missouri*, 281 U. S. 586;
Beidler v. *South Carolina Tax Comm.*, 282 U. S. 1;
First Nat'l Bank v. *Maine*, 284 U. S. 312;
New Orleans v. *Stempel*, 175 U. S. 309;
Colgate v. *Harvey*, 296 U. S. 404;
Senior v. *Braden*, 295 U. S. 422;
Wheeling Steel Corp. v. *Fox*, United States Supreme Court, No. 663, October Term, 1935, decided May 18, 1936. (Not officially reported.)

By reason of the foregoing, it is respectfully submitted this this Honorable Court has jurisdiction of this appeal by virtue of Sec. 237a of the Judicial Code.

Dated September 2nd, 1936.

Respectfully submitted,

DAVID COHN,
MAURICE COHN,
Counsel for Appellant.

RANDOLPH E. PAUL, ESQ.,
WATSON WASHBURN, ESQ.,
Of Counsel.

COURT OF APPEALS.

THE PEOPLE OF THE STATE OF NEW YORK *upon the Relation of* ANNIE COHN, *Relator-Respondent*,

against

MARK GRAVES, JOHN J. MERRILL, JOHN P. HENNESSEY, *as Commissioners Constituting the State Tax Commission of the State of New York, Respondents-Appellants.*

CRANE, *Ch. J.*:

Rents from real property located in New Jersey, as well as interest from mortgages on similar property is, in my opinion, taxable income when received by a resident of this State. The tax upon such income is not a tax on the New Jersey real estate. The Pollock case (Pollock *v.* Farmers' Loan and Trust Co., 157 U. S. 429) has not decided otherwise and should not be pushed to cover this point. Many cases have gone through the courts since that decision explaining and clarifying its limitations. What may be a "direct" tax under the Federal Constitution may be income (as it really is) for other purposes.

The order of the Appellate Division should be reversed and the determination of the State Tax Commission affirmed, with costs in this Court and in the Appellate Division. A question under the Federal Constitution was presented and necessarily passed upon by this Court, viz.: Is section 359 of the Tax Law of the State of New York, as amended by chapter 933, Laws of 1935, in so far as it imposes an income tax upon rents received by a resident of this State from real property located in a foreign State repugnant to, and violative of any provision of the Constitution of the United States. This Court held the sections of said Tax Law herein involved to be a valid exercise of legislative power.

HUBBS, *J.* (dissenting):

The relator, Annie Cohn, during the years 1931 and 1932, while a resident of this State, received, as the beneficiary of a life estate created by the will of her deceased

husband, certain income, part of which was derived from rents from real estate located in the State of New Jersey and part from interest on bonds and mortgages upon real property located in that State. There were three executors of the will, two of whom resided in New Jersey and relator who resided in this State. The executors qualified in the State of New Jersey. Since 1913 they have been functioning in that State and the office of the state is and always has been in the City of Paterson, where the securities are kept in a bank. The executors have managed the estate property, collected rents and income from bonds and mortgages, and made repairs to the real property.

The relator filed a State income tax return showing income received from the estate, consisting of rents from certain specified real properties located in New Jersey and interest on mortgages covering real property in that State. She paid an income tax on such income. Thereafter she made application for refund of the taxes paid, as erroneously paid or illegally collected, her contention being that this State was without power to tax either the rental income derived from real property located without the State or the income from bonds and mortgages upon real property located without the State, where the situs of such intangibles was likewise without the State. In making the application for refund, the appellant relied upon Matter of Pierson *v.* Lynch (237 App. Div., 763; affd. 263 N. Y. 533). The appeal in that case was dismissed by the United States Supreme Court.

The Legislature amended the Tax Law (Cons. Laws, ch. 60) by chapter 933 of the Laws of 1935, and provided that the rental income derived by a resident of New York State from real property located without the State constituted taxable income. The law was made retroactive to January 1, 1919.

The relator's claims for refund were denied. This proceeding was thereupon instituted. The Appellate Division decided that the identical question presented had been decided in Matter of Pierson *v.* Lynch (supra); that the fact that the statute which authorized the tax, Section 359 of the Tax Law, has been amended since the decision

in the Pierson case is without significance as that case was decided solely upon the ground that under the Fourteenth Amendment to the Federal Constitution it was not within the power of a State to tax a resident of the State on account of rentals or income received from land located beyond its borders. Reference was also made to the determination of the Supreme Court of the United States in Senior *v.* Braden (295 U. S. 422).

Upon this appeal the State Tax Commission contends, despite the determination of this court in the Pierson case and despite the decision of the United States Supreme Court in Pollock *v.* Farmers' Loan & Trust Co. (157 U. S. 429), which latter case held in effect that a tax upon the income from real property was the same in substance as a tax on the real property, that the rents and mortgage interest derived from real property located without the State received by a resident of this State are properly subject to the New York personal income tax law.

It would be impossible, without squarely receding from the position taken in the Pierson case, to hold that income represented by rentals from real property located in another State may be included as part of the owner's income for the purpose of computing the owner's income tax in this State. We believe that case was correctly decided. The only difference in the facts of the two cases is that in the Pierson case title to the real property appears to have been in the recipient of the income in her individual name, whereas in the present case the recipient of the income had only a life interest in the property. This slight difference in the facts of the two cases is not urged as a ground for the application of a different rule and, of course, could not be urged as such a ground, since the question involved is based upon the broad ground of whether the income tax is such a tax as may not be imposed by one State upon real real property and tangible personal property located in another. The argument of the Tax Commission is, in substance, that the decision in Matter of Pierson *v.* Lynch (supra) was based upon the decision of the Supreme Court of the United States in the Pollock case and that, as a matter of fact, the decision in

the Pollock case has no bearing upon the point at issue here. The tax involved in the Pollock case was an annual tax levied by the Congress of the United States on the income of persons and corporations. It was decided that a tax on the rents or income of real estate is a direct tax within the meaning of the Constitution of the United States which, by the third clause of Section 2, Article I, requires that direct taxes shall be apportioned among the several States and that since the income tax law under consideration did not provide apportionment of the tax collected and the tax was a direct tax, the act was in violation of the United States Constitution and to the extent that it levied a tax on the rents or income of real estate was invalid. The determination in the Pollock case has been repeatedly stated to have amounted to a holding upon the constitutional meaning of the word "direct"—that is, that a tax on income from real property amounts in effect to a direct tax upon the property (Knowlton *v.* Moore, 178 U. S. 41; Flint *v.* Stone Tracy Co., 220 U. S. 107; McCoach *v.* Minehill R'y, 228 U. S. 295).

In the Pollock case the question involved was as to the validity of the act of Congress as construed in the light of the Federal Constitution, whereas in the instant case we are concerned with the effect of a tax imposed by the State in view of the provision of the Federal Constitution. There seems to be nothing in the late decisions of the United States Supreme Court which detracts from the effect of its decision in the Pollock case that a tax upon the income from real property is a direct tax and equivalent to a tax upon the property itself.

In Senior *v.* Braden, (*supra*) the State of Ohio taxed transferable certificates under declarations of trust entitling the holders to a portion of rents from specific parcels of real estate, some within the State of Ohio, some in other states. It was conceded that under the Fourteenth Amendment the States had no power to tax land or interests in land beyond its borders, and that if the certificates constituted interests in land, the tax would be unconstitutional and void. It was decided that a tax in Ohio on the certificates was void. It appeared that each parcel of land cov-

ered by the certificates was taxed in the State where located. In each the trustee held and managed the property for the use and benefit of the certificate holders and distributed the rents and proceeds of sales. Each certificate holder was said to hold a beneficial interest in the trust of each parcel, and the trustee was free from the control of the certificate holders. The State contended that the interest of a certificate holder was a species of intangible personal property entitling the holder to a *pro rata* distribution of income and proceeds of sales; that the certificate was the evidence of the holder's interest in land, legal title of which the trustee held. The court held the certificate holders had interests in and to the property which were more than a bare right and much more than a choice in action, citing and quoting from Brown *v.* Fletcher (235 U. S., 589). The dissenting opinion of Mr. Justice Stone indicates that he understood the prevailing opinion to hold that a State could not tax the income from real property located in another State. The court decided that the same rule applied under the State statute as under the United States statute, thereby extending the rule of the Pollock case and making it applicable under a State statute. Although that case did not involve an income tax statute, it did involve a tax under the investments measured by the income.

As land in another State cannot be taxed against the owner in this State, and a tax upon the income from real property is a tax upon the real property itself, it follows that the tax assessed in the case at bar on the rents received was illegal. It was also illegal as constituting double taxation for the reasons hereinafter stated.

There remains the question as to whether the income from bonds and mortgages is likewise entitled to be exempted from the application of the State income tax. In considering that question, it is to be borne in mind that the property upon which the mortgages exist is wholly without the State of New York, and, further, that the evidences of the indebtedness, that is, the bonds and mortgages, are likewise without the State. Furthermore, they are a part of an estate administered by the executors in a measure as

a business in the State of New Jersey. The income results from the investment of funds of the estate, the supervision of those investments, and the activity of the executors in collecting the income. The court below seems to have treated the income from mortgages on the real property under the same category as rentals. That type of income was not involved in Matter of Pierson *v.* Lynch (*supra*). Mortgage interest is not compensation for the use of real property but rather compensation for the use of money. That is, it constitutes compensation for a loan of money or forbearance on an indebtedness. The debt is not tangible and the mortgage upon the real property is only collateral security for the intangible. If it were necessary to construe the decision in this case as a determination that a tax upon mortgage interest is a direct tax on the land, there would be difficulty in sustaining the decision in so far as that type of income is concerned. However, the courts have gone much further and have held that where intangible as well as tangible property has acquired a business situs in another State, taxation thereof by the State other than the State in which it had acquired a business situs would violate the due process clause of the Fourteenth Amendment of the United States Constitution and constitute double taxation. In New Orleans *v.* Stempel, (175 U. S. 309) the defendant in error, domiciled in New York, was the owner of credits evidenced by notes largely secured by mortgages on real property in New Orleans. The notes and mortgages were in the City of New Orleans in the possession of an agent of the defendant in error. The agent collected the interest and principal as it became due and deposited the same in a bank in New Orleans. The question involved in that case was as to whether the property in the hands of the agent was subject to taxation in New Orleans. It was held that such taxation did not infringe any rights secured by the Federal Constitution. It was said that when an indebtedness has taken a concrete form and become evidenced by note, bill, mortgage or other written instrument, and the written instrument evidencing the indebtedness is left within the State in the hands of an agent of the non-resident owner to be by the agent used for

the collection and deposit or reinvestment within the State, its taxable situs is in the State (De Ganay *v.* Lederer, 250 U. S. 376).

It seems to be quite clear that property, consisting of bonds, mortgages and similar evidences of indebtedness, is taxable in the State where they are physically located if they are there, as in this case, for the purpose of collection of principal and interest and for management by an agent within the State. For the purpose of taxation, the intangible debt, when represented by something of a concrete nature such as a bond or mortgage, becomes in the nature of a tangible item of property at the business situs (De Ganay *v.* Lederer, *supra;* Hill *v.* Carter, 47 Fed. Rep. (2d) 869; Opinion of the Justices, 84 N. H. 559; Harrison *v.* Commissioner of Corporations and Taxations, 272 Mass. 422).

The same principle applies to tangible personal property. (Union Refrigerator Transit Co. *v.* Kentucky, 199 U. S. 194; Frick *v.* Pennsylvania, 268 U. S. 473; see, also, Senior *v.* Braden, supra).

Maguire *v.* Trefry (253 U. S. 12) was at one time direct authority for holding that the income from the bonds and mortgages on real property situate in New Jersey is taxable in this State. The United States Supreme Court has, however, departed from the rule stated in that case. (Farmers' Loan & Trust Co. *v.* Minnesota, 280 U. S. 204).

In Senior *v.* Braden (*supra,* p. 432) the court said that the views expressed in the Maguire case "are not in harmony with Safe Deposit & Trust Co. *v.* Virginia, 280 U. S., 83, and views now accepted here in respect of double taxation."

If the decision in the Maguire case is in conflict with the present views of the United States Supreme Court, it necessarily follows that under the decision of that court, the income from the New Jersey bonds and mortgages is not subject to the payment of an income tax in this State. In the case of Union R. T. Co. *v.* Kentucky (*supra*) it was definitely decided that a State could not tax tangible property permanently situated outside of the State or domicile of the owner and used there in the owner's business.

Later the court extended the principle to intangibles in order to eliminate unjust double taxation, stating in effect that it is no more possible for an intangible to have a legal status in two places at the same time than it was possible for a tangible to be in two places at the same time (First Nat. Bank *v.* Maine, 284 U. S. 312; Baldwin *v.* Missouri, 281 U. S. 586; Safe Deposit & Trust Co. *v.* Virginia, 280 U. S. 83).

While there has been a sharp conflict among the members of the United States Supreme Court on the subject, and its earlier decisions are, in certain instances, in conflict with its later decisions, still we understand the late decisions to mean that double taxation is illegal and that the income from securities which have a taxable situs in one State cannot be legally taxed in another State. The decisions of that court are binding upon us on the questions here involved and should be strictly followed.

As the property from which the relator's income was derived had a business situs in New Jersey and was taxable there, the income therefrom cannot be taxed in this State. The order of the Appellate Division should be affirmed, with costs.

Lehman, Crouch and Finch, JJ., concur with Crane, Ch. J.; Hubbs, J., dissents in opinion, in which O'Brien and Loughran, JJ., concur.

Order granted.

SUPREME COURT, APPELLATE DIVISION—THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK *upon the Relation* OF ANNIE COHN, *Relator*;

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, *as Commissioners Constituting the State Tax Commission of the State of New York, Respondents.*

HILL, P. J.:

The State Tax Commission has assessed an income tax against the relator, a resident of New York State, on account of rentals and income which she received from real property situate in New Jersey. A petition for a refund made as prescribed in the Tax Law has been denied by the Commission. That determination comes before our court for review under a writ of certiorari. The identical question now presented has been decided in this court, and adversely to the Commission's determination. (Matter of Pierson *v.* Lynch, 237 App. Div. 763; affd. without opinion, 263 N. Y. 533; writ of certiorari dismissed as improvidently granted, 293 U. S. 52.)

The fact that the statute which authorized the tax (Tax Law, Sec. 359) has been amended since the decision in the Pierson case is without significance, as we decided that case solely upon the ground that under the Fourteenth Amendment to the Federal Constitution it was not within the power of a State, irrespective of the wording of the statute, to tax a resident of the State on account of rentals or income received from land located beyond its borders. The 1935 amendment (Laws of 1935, chap. 933) only makes more definite and certain the meaning which we gave section 359 in deciding the Pierson case, and does not detract from the force of that authority.

Further citation of authority may be cumulative, as the Pierson case is a direct authority, decided first in this court and unanimously affirmed without opinion in the Court of Appeals. However, as the Supreme Court of the United States in a later case has reapplied the law as it had been settled earlier, and as it was applied in the Pierson case, a brief examination of the more recent case (Senior *v.*

Braden, 295 U. S. 422) may be proper. There "The Ohio General Code provided that all investments and other intangible property of persons residing within the State should be subject to taxation" (p. 427). "Appellant owned transferable certificates showing that he was beneficiary under seven separate declarations of trust, and entitled to stated portions of rents derived from specified parcels of land—some within Ohio, some without" (p. 428). The taxing officials threatened to assess the income which the appellant received upon these declarations of trust. He instituted a suit to restrain the collection of the tax upon the ground that the Ohio statute was unconstitutional under the Fourteenth Amendment. The opinion states: "With commendable frankness counsel admit that under the Fourteenth Amendment the State has 'no power to tax land or interests in land situate beyond its borders;' * * *. Consequently, they say, 'if the property of appellant, which the appellees seek to tax in this case, is land or interest in land situate * * * without the State, their action is unconstitutional and should be permanently enjoined.'"

In the Senior case there were three parcels of land outside Ohio to which separate declarations of trust applied. The attorney for the Ohio taxing officials recognized, as it was recognized by us in the Pierson case, that the law was settled, and conceded, inter alia, that the State had no power to tax land or interests in land situate beyond its borders. The court applied that rule. The opinion quite largely dealt with the subject of whether the land trust certificates were interests in land. It was determined that they were, and the court restrained the enforcement of the tax upon the ground that the State had no power to tax land or interest in land situate beyond its borders, and that a tax upon the income from land was tantamount to a tax upon the land.

The determination should be annulled, with fifty dollars costs and disbursements.

Crapser, Bliss and Heffernan, JJ., concur; Rhodes, J., dissents and votes to confirm.

Determination annulled, with fifty dollars costs and disbursements.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 404.

THE PEOPLE OF THE STATE OF NEW YORK upon the Relation of ANNIE COHN,

Appellant,

v.

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,

Appellees.

On Appeal from the Supreme Court of the State of New York.

APPELLANT'S BRIEF

Official Reports of Opinions in the Courts Below

The opinion of HILL, P. J., in the Appellate Division holding the challenged tax unconstitutional is officially reported in 246 App. Div. 335.

The majority opinion of the New York Court of Appeals written by CRANE, Chief Judge, reversing the Appellate Division, and the dissenting opinion written by HUBBS, J., are officially reported in 271 N. Y. 353.

Statement as to Jurisdiction

Paragraph I of Rule 12 has been complied with. Hence no further statement of the grounds on which the jurisdiction of this Court is invoked is set forth.

This is an appeal from a final judgment of the Supreme Court of the State of New York, County of Albany, entered upon the remittitur of the New York Court of Appeals, affirming a final determination of the State Tax Commission, the appellees, which denied appellant's applications for refund of income taxes paid with respect to the calendar years 1931 and 1932.

A certiorari proceeding was brought by the appellant in said Court, under provisions of the New York State Income Tax Law (Tax Law, §§ 374, 375, 199*), to review and correct the final determination of the State Tax Commission, returnable before the Appellate Division, Third Department. The latter Court annulled the determination of the State Tax Commission. Mr. Justice RHODES dissented (R. 18-19).

The judgment of said Appellate Division was thereafter reversed and the determination of the State Tax Commis-

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*§374. *Revision and readjustment of accounts by tax commission.* If an application for revision be filed with the tax commission by a taxpayer within two years from the time of the filing of the return, * * * the tax commission shall grant a hearing thereon and if it shall be made to appear, upon any such hearing by evidence submitted to it or otherwise, that any such computation includes taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such amount so computed, the tax commission shall resettle the same according to law and the facts, and adjust the computation of taxes accordingly, and shall send notice of its determination thereon to the taxpayer.

§375. *Review of determination of tax commission by certiorari and regulations as to writ.* The determination of the tax commission upon any application made to it by any taxpayer for revision and resettlement of any computation of tax, as prescribed by this article, may be reviewed in the manner prescribed by and subject to the provisions of section one hundred and ninety-nine of this chapter.

§199. *Review of determination of tax commission by certiorari.* The determination of the commission upon any application made to it by any person, partnership, company, association or corporation for a revision and resettlement of any account, as prescribed in this article, may be reviewed both upon the law and the facts upon certiorari by the supreme court at the instance of any person, partnership, company, association or corporation affected thereby, and in the name and on behalf of the people of the state. For the purpose of such review the commission shall return, on such certiorari, the accounts and all the evidence before it on such application, and all the papers and proofs upon the original statement of such account and all proceedings thereon. If the original or resettled accounts shall be found erroneous or illegal, either in point of law or of fact, by the supreme court, upon any such review, the accounts reviewed shall then be corrected and restated, and from any determination of the supreme court upon any such review an appeal to the court of appeals may be taken by either party.

sion affirmed by the Court of Appeals of the State of New York (R. 32-34).

Judge HUBBS of the Court of Appeals dissented in a written opinion, in which Judges O'BRIEN and LOUGHRAN concurred (R. 24-30).

The order and judgment of said Court of Appeals were thereafter made the order and judgment of the said Supreme Court on July 14, 1936, and August 18, 1936, respectively (R. 32-34).

Statement

The appellant, a resident of the State of New York during the years 1931 and 1932 (R. 12), was the owner of a life estate in real and personal property in the State of New Jersey (R. 13). In February, 1913, Marcus Cohn, the husband of appellant, died, testate, a resident of the City of Paterson, County of Passaic, and State of New Jersey, devising and bequeathing to her the entire net income from his estate (after certain minor bequests) during her widowhood (R. 13). She filed income tax returns for the years 1931 and 1932 (R. 12), reporting that in 1931 her gross income was $40,547.38 and her net income $24,822.34 (R. 6-7); that all of said income was received (or credited to her account) from the Estate of Marcus Cohn, deceased, a non-resident estate (R. 14); that of said income $18,897.39 was rents from the following properties: 330 Main Street, 201 Main Street and 421 Main Street, all located in the City of Paterson, State of New Jersey (R. 6-7, 14), and $8,057.08 was interest from mortgages belonging to said non-resident estate, covering real estate in the State of New Jersey (R. 14); that in 1932 her gross income was $32,320.60 and her net income $19,535.02 (R. 8); that all of said income was received (or credited to her account) from said non-resident estate; that of said income $16,213.25 was rents from the aforesaid New Jersey properties and

$7,615.50 was interest from said New Jersey mortgages (R. 8). For the year 1931, she paid a tax of $792.89 and for the year 1932, $606.80, the latter tax, however, being reduced by a refund of $25.24 (R. 12-13).

Appellees concede that the Estate of Marcus Cohn, deceased, is a non-resident estate, created in 1913; that the executors thereof are David Cohn, Maurice Cohn and the appellant, all of whom qualified in 1913 and have been functioning in New Jersey ever since; that the office of the estate is and always has been at No. 112 Ellison Street, in the City of Paterson, State of New Jersey; that the estate has always been administered by the said executors in the State of New Jersey; that during the years 1931 and 1932, two of the executors, David Cohn and Maurice Cohn, were residents of the State of New Jersey; and that the aforesaid bonds and mortgages of said estate were always physically in the State of New Jersey and kept in a safe deposit box in the Paterson National Bank in Paterson, N. J. (R. 13-14). Since 1913, David Cohn and Maurice Cohn always acted as the agents of the appellant in the State of New Jersey, managed the aforesaid properties besides collecting the rents, collected the interest and the amortization payments on the bonds and mortgages, invested and reinvested same in the State of New Jersey, and received an annual compensation therefor.

Contemporaneously with the filing of her individual returns, the appellant filed information returns as an executor of the said non-resident estate (R. 13, 14, 15), indicating specifically the amounts of rents received, or credited to her account, from the New Jersey real estate and the amounts of interest from the New Jersey bonds and mortgages, as aforesaid for the years 1931 and 1932.

On or about April 12, 1934, the appellant duly made application to the State Tax Commission, the appellees, for income tax refunds of $792.89 and $606.80 (less $25.24 refund) for the years 1931 and 1932, respectively (R. 13), as erroneously paid or illegally collected, in the manner,

within the time and on the forms prescribed by the New York Tax Law and Regulations, and cited the case of *Pierson v. Lynch,* 237 App. Div. 763 (March 15, 1933) unanimously affirmed by the Court of Appeals without opinion, 263 N. Y. 533 (November 21, 1933), as authority therefor.

On May 14, 1934, the appellees notified the appellant that said claims for refunds would be held in abeyance pending a final determination in the case of *Pierson* v. *Lynch* which was to be carried to the United States Supreme Court (R. 4-5).

On January 21, 1935, the appeal in *Pierson* v. *Lynch* having been dismissed by this Court, 293 U. S. 52 (1934), the appellees notified the appellant that the State Tax Commission had not yet had sufficient time to determine the full effect of the decision as affecting other taxpayers who had not joined in the action; that the matter was being considered and at such time as the question was definitely decided any required adjustment of the returns of the taxpayer (the appellant) would be made (R. 5).

On July 24, 1935, the appellees wrote to the appellant that the Legislature in May, 1935, amended the Tax Law (Chap. 933, Laws of 1935)* by providing that the rental income derived by a resident of New York State from real property located without the State constituted taxable income; that the Law was made retroactive to January 1, 1919; and that the appellant's claims for refunds were denied (R. 4).

Appellant thereupon procured a writ of certiorari from the Supreme Court of the State of New York, returnable before the Appellate Division, Third Department. In her petition, she averred that the Tax Law of the State of New York in imposing a tax upon a resident on rents and mortgage interest derived from real estate in the State of New Jersey violated appellant's rights under the Constitu-

*Chapter 933, of the Laws of 1935, §359, as amended, is set forth on pages 7-8 of this brief.

tion of the United States and the Fourteenth Amendment thereof. The latter Court annulled the determination of the State Tax Commission. Presiding Justice HILL wrote the opinion of the Court, in which CRAPSER, BLISS and HEFFERNAN, JJ., concurred. Mr. Justice RHODES dissented without opinion (R. 18-19). The case is reported in 246 App. Div. 335 (1936). The opinion will be found on pages 21-22 of the Record. The Court held "that under the Fourteenth Amendment of the Federal Constitution it was not within the power of a state, irrespective of the wording of the statute, to tax a resident of the state on account of rentals or income received from land located beyond its borders."

The State Tax Commission took an appeal to the Court of Appeals, which Court reversed the order of the Appellate Division and affirmed the determination of the State Tax Commission. CRANE, Ch. J., wrote the opinion of the Court, in which LEHMAN, CROUCH and FINCH, JJ., concurred. HUBBS, J.. dissented in a written opinion, in which O'BRIEN and LOUGHRAN, JJ., concurred. The case is reported in 271 N. Y. 353 (1936), and the opinions will be found on pages 23-30 of the Record.

The judgment appealed from was thereafter entered upon the remittitur of the Court of Appeals (R. 34-35).

Questions Presented

The facts being stipulated (R. 12-16), only questions of law are involved in the instant case and presented by this appeal, namely, whether the State of New York can, consistently with the due process clause of the Fourteenth Amendment of the Constitution of the United States, impose its income tax on the income received by a resident of New York, consisting of rent from real property located in New Jersey, and of interest on bonds and mortgages physically located in and secured by real estate in New Jersey and having a situs in New Jersey; and, if so,

whether Chap. 933, Laws of 1935, is arbitrary, capricious and unreasonable and violative of the Fourteenth Amendment of the Constitution of the United States in so far as it operates retroactively so as to tax such income received three or more years prior to the enactment of said Chap. 933.

The Statute

The statute, the validity of which is involved, is Sec. 359 of the Tax Law of the State of New York, as amended by Chap. 933, Laws of 1935, page 1768, and reads as follows:*

> Sec. 359. *Gross Income Defined.* * * * "Includes gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, *and whether situated within or without the state,* growing out of the ownership or use of or interest in such property; also from interest, rent (*including rent derived from real property situated outside the state*), dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, including gains or profits or income derived through estates or trusts by the beneficiaries thereof, whether as distributed or as distributable shares, *it being intended to include all the foregoing items, without regard to the source thereof, location of the property involved, or any other factor, except only a case where the inclusion thereof would be violative of constitutional restrictions.* The amount of all such items shall be included in the gross income for the taxable year in which received by the taxpayer, unless, under the methods of accounting permitted in this article, any such amounts are to be properly accounted for as of a different period; but,
>
> Sec. 2. *This act shall be retroactive to January first, nineteen hundred nineteen.*

*The matter in italics is new and was comprised in the Amendment of 1935, and is challenged in the instant case.

Sec. 3. This act shall take effect immediately." (May 16, 1935.)

The following section, as amended by Chap. 35, Laws of 1935, page 395 (February 16, 1935) of the Tax Law of the State of New York is involved in the determination of the validity of the challenged statute:

> Sec. 351. *Imposition of Income Tax.*—"A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: * * * A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state."

The Article of the Federal Constitution on which appellant relies:

> Article XIV, §1. "* * * nor shall any State deprive any person of * * * property, without due process of law, * * *."

Specification of Errors Assigned and Urged Upon This Appeal

The Court of Appeals erred:

1. In holding that Section 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, in so far as it imposes an income tax upon rents received by (or credited to the account of) a resident of this State from real property located in a foreign state, is not violative of or repugnant to the Fourteenth Amendment of the Constitution of the United States.

2. In holding that Section 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, in so far as it imposes an income tax upon interest received by (or credited to the account of) a resident of the State from bonds and mortgages physically located in and secured by real estate in the State of New Jersey, and which bonds and mortgages have a situs in the State of New Jersey, does not contravene the Fourteenth Amendment to the Federal Constitution.

3. In holding that Section 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, in so far as the following provision thereof (*i. e.*, "Sec. 2. This act shall be retroactive to January first, nineteen hundred and nineteen") is not violative of or repugnant to the Constitution of the United States, and particularly the Fourteenth Amendment thereof; in failing to hold that said retroactive provision is arbitrary, unreasonable and unjust.

4. In holding that Sec. 359 of the New York Tax Law, as amended by Chap. 933, Laws of 1935, page 1768, does not violate the Fourteenth Amendment to the Federal Constitution, in that its operation does not constitute double or multiple state taxation.

Summary of Argument

I. A tax upon rents from real estate is in substance and effect a tax upon the property itself. Therefore, an income tax imposed by a domiciliary state upon rents derived from real estate in a sister state is beyond the power of such state and violates the due process clause of the Fourteenth Amendment of the Federal Constitution.

The recent decisions of this Court hold squarely that a domiciliary state cannot impose either a property or an inheritance tax upon property with a situs in another state; neither can the domiciliary state measure such a tax

by reference to extraterritorial property. An *inheritance* tax impinges only once, while an *income* tax encroaches annually. *A fortiori,* a tax based on income derived from real property in another state should be inhibited as beyond the power of the domiciliary state and as contravening the Fourteenth Amendment.

II. This Court has held that intangible property with a business situs in one state cannot be legally taxed in another state. As income from property so situated is taxable by the state of situs it should not be taxable again, even by indirection, in another state.

III. This Court has repeatedly and emphatically expressed its hostility to multiple state taxation, as oppressive, confiscatory and illegal.

IV. Retroactive tax legislation attempting to tax income for more than a reasonable period prior to its enactment (in this instance, sixteen years) is arbitrary, unreasonable and unjust, and therefore unconstitutional.

ARGUMENT

POINT I

The domiciliary state lacks the power to tax income derived from real property located in a sister state.

(a) *No State may tax lands lying in another State. This is a basic and elementary principle in our jurisprudence.*

In *Union Refrigerator Transit Co.* v. *Kentucky,* 199 U. S. 194, 204 (1905), this Court said:

> "Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another state; much less where such action has been defended by any court."

In *Hoyt* v. *Commissioners of Taxes*, 23 N. Y. 224, 226 (1861), the Court of Appeals said:

> "It is conceded that lands lying in another State or country, cannot be taxed against the owner resident here, and no one ever supposed the contrary."

See also

Senior v. *Braden*, 295 U. S. 422 (1935);
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83 (1929);
Frick v. *Pennsylvania*, 268 U. S. 473 (1925);
Farmers' Loan & Trust Co. v. *Minnesota*, 280 U. S. 204 (1930);
Baldwin v. *Missouri*, 281 U. S. 586 (1930).

(b) *A tax upon the rents from real estate is in substance and effect a tax upon the real estate.*

In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 580, 581 (1895), Mr. Chief Justice FULLER, in delivering the opinion of this Court, said:

> "* * * Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great classes of taxes, and the rent or income which is the incident of its ownership belongs to the other. We are unable to perceive any ground for the alleged distinction. An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income * * *."

And on rehearing, 158 U. S. 601, 630 (1895), the Chief Justice speaking for the Court, said:

"We have unanimously held in this case that, so far as this law operates on the exemptions from municipal bonds, it cannot be sustained, because it is a tax on the power of the states, and on their instrumentalities to borrow money, and consequently repugnant to the Constitution. But if, as contended, the interest when received has become merely money in the recipient's pocket, and taxable as such without reference to the source from which it came, the question is immaterial whether it could have been originally taxed at all or not. This was admitted by the Attorney General with characteristic candor; and it follows that, if the revenue derived from municipal bonds cannot be taxed because the source cannot be, the same rule applies to revenue from any other source not subject to the tax; and the lack of power to levy any but an apportioned tax on real and personal property equally exists as to the revenue therefrom."

In *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 275 U. S. 136, 140 (1927), Mr. Justice McREYNOLDS, delivering the opinion of this Court, said:

"* * * Certainly, since Gillespie v. Oklahoma, 257 U. S. 501, 505, it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom. To tax this would amount practically to laying a burden on the exempted principal. Accordingly, if the challenged act, whatever called, really imposes a direct charge upon interest derived from United States bonds, it is *pro tanto* void."

In *National Life Ins. Co.* v. *United States*, 277 U. S. 508, 521 (1928), Mr. Justice McREYNOLDS, delivering the opinion of this Court, said:

"It is settled doctrine that directly to tax the income from securities amounts to taxation of the securities themselves."

In *Opinion of the Justices*, 84 N. H. 559, 573, 574, 149 A. 321 (1930), the Supreme Court of New Hampshire said:

"The provision for the taxation of rents cannot be applied to rent paid for the use of real property situated outside the state, although the rent is received by a resident. It has always been the accepted rule that a state cannot lay a tax upon realty not within its jurisdiction. *Winnipiseogee Lake, etc., Co.* v. *Gilford,* 64 N. H. 337, 349. The same principle applies to tangible personal property. *Union, etc., Co.* v. *Kentucky,* 199 U. S. 194; *Frick* v. *Pennsylvania,* 268 U. S. 473; *Winkley* v. *Newton,* 67 N. H. 80.

In *Pollock* v. *Farmers' Loan & Trust Co.,* 157 U. S. 429, S. C. 158 U. S. 601, it was held upon great consideration that a tax laid upon rent is a direct tax upon the land out of which the rent issues. *Opinion of the Justices,* 77 N. H. 611, 615, 626. While the question, whether a state could tax rent received for the use of realty over which the state had no jurisdiction, was expressly excluded from consideration in *Union, etc.* v. *Kentucky, supra,* the logic of the later decisions points plainly to the conclusion that such a tax would be in violation of the provisions of the Federal Constitution. *Nat. Life Ins. Co.* v. *United States,* 277 U. S. 508; *Gillespie* v. *Oklahoma,* 257 U. S. 501.

We are of opinion that a state cannot tax income received as compensation for the use of either real estate or tangible personal property which has a *situs* outside the state. To avoid misapprehension, we add that this limitation does not apply to the taxation of intangibles owned by residents. *Hawley* v. *Malden,* 232 U. S. 1."

The Supreme Court of Massachusetts said (*Opinion of the Justices,* 220 Mass. 613, 624) (1915):

"* * * A tax upon the income of property is in reality a tax upon the property itself. Income derived from property is also property. Property by income produces its kind, that is, it produces property and not something different. It does not matter what name is employed. The character of the tax cannot be changed by calling it an excise and not a property tax. In its essence a tax upon income derived from property is a tax upon the property. This was decided after most elaborate consideration, with affluent cita-

tion of authorities, in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 581; S. C. 158 U. S. 601. We do not need to review that ground or to re-state the arguments in its support. It follows that a tax upon such income is a property and not an excise tax * * *."

See also

Harrison v. *Commissioner of Corporations and Taxation*, 272 Mass. 422 (1930);

Hart v. *Tax Commissioner*, 240 Mass. 37 (1921).

In *Pierson* v. *Lynch, et al.*, 237 App. Div. (N. Y.) 763 (1933) (unanimously affirmed by the Court of Appeals, 263 N. Y. 533) (1933), Mr. Presiding Justice HILL, in giving the opinion of the Court, said:

"'An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.' (Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 581.) 'In this court the presently approved doctrine is that no State may tax anything not within her jurisdiction without violating the Fourteenth Amendment. State Tax on Foreign-Held Bonds, 15 Wall. 300; Union Refrig. Transit Co. v. Kentucky, 199 U. S. 194; Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83.' (Farmers' Loan & Trust Co. v. Minnesota, 280 U. S. 204, 210.) 'Taxation at the place of domicile of tangibles located elsewhere has been thought to be beyond the jurisdiction of the State.' (Lawrence v. State Tax Commission, 286 U. S. 276, 280.) The same opinion (p. 281) also speaks of 'the rule now established that tangibles located outside the State of the owner are not subject to taxation within it.' 'Tangible personal property permanently located beyond the owner's domicile may not be taxed at the latter place.' (Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83 93.) Analogy between tangible personal property with a fixed situs and real property would sustain the application of the same rule as to each. The rental income from this real property located in Ohio may not be included by the State of New York as a part of petitioner's income for the purposes of the income tax."

The majority opinion of the New York Court of Appeals in the instant case ignored the *Pierson* decision, which held squarely that rental received by a resident of New York from real property owned by her in Ohio was not taxable in the domiciliary state.

The majority opinion of the Court of Appeals overlooked *Senior* v. *Braden, supra.* This Court held that a property tax measured by the income yield of transferable trust certificates covering interests in realty in another State, was unconstitutional. *Maguire* v. *Trefry,* 252 U. S. 12 (1920) was distinguished. We quote from the opinion of the Court, delivered by Mr. Justice McReynolds:

> "Maguire v. Trefry, 252 U. S. 12, much relied upon by appellees, does not support their position. There the Massachusetts statute undertook to tax incomes; the securities (personalty) from which the income arose were held in trust at Philadelphia; income from securities taxable directly to the trustee was not within the statute. The opinion accepted and followed the doctrine of Blackstone v. Miller, 188 U. S. 189, and Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54. Those cases were disapproved by Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204. They are not in harmony with Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, and views now accepted here in respect of double taxation. See Baldwin v. Missouri, 281 U. S. 586; Beidler v. South Carolina Tax Comm., 282 U. S. 1; First Nat'l Bank v. Maine, 284 U. S. 312."

We submit that the Court of Appeals in deciding the case at bar misinterpreted or misconceived the true significance of the *Pollock* decision. It is true that the *Pollock* case decided *inter alia* that a tax on income from real estate was a direct property tax and that because it was not apportioned among the states as provided by the Constitution, it was void; but this conclusion was predicated upon the major premise that a tax on income or rents from real property was in substance and effect a tax upon the real estate. And regardless of our individual views of the

meaning of the concept "direct taxation" under the federal constitution prior to 1895, there is no escape from the sound reasoning of the *Pollock* decision.

The general rule* has always been, in the language of Coke:

> "But if a man seised of lands in fee by his deed granteth to another the profit of those lands, and to have and to hold to him and his heires, and maketh livery *secundum formam chartae*, the whole land itselfe doth passe; for what is the land but the profits thereof;" Co. Lit. 4b.

See also:

> *Knowlton* v. *Moore*, 178 U. S. 41, 81 (1900);
> *McCoach* v. *Minehill & Schuylkill Haven Railroad Co.*, 228 U. S. 295, 306 (1913);
> *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (1911).

Alexander Hamilton, discussing this subject asks: "What, in fact, is property, but a fiction, without the beneficial use of it?", and adds "In many cases, indeed, the *income* or *annuity* is the property itself." Hamilton's Works, Putnam's ed. vol. 3, p. 34.

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*We cannot resist quoting from the argument of the late Hon. Joseph H. Choate, one of the counsel in the Pollock case, because of its forceful application to the present issue.

"* * * If the court please, as to this matter of rent, is a tax on rent distinguishable from a tax on land? I say that a tax on land yielding income by whatever name is in reality, in effect and substance, a tax upon the rental. I speak now, of course, of rented property. I am not foolish enough to argue that a tax on rents is the same thing as a tax on land which nobody rents. I am looking, however, at the nature of the tax; not the form, but the substance. Your honors will observe that the tax laid by this law is a yearly tax upon the yearly rental. Can that be distinguished from a tax on land? How under heaven is a tax on land to be paid, except out of the income? How is it possible? I mean in the common, ordinary, practical business of life which the court is bound to look at. We are living under a constitutional government, are we not? We have regulated the measure of our own taxation by the Constitution. Was it intended that, although Congress could not put an unapportioned tax upon real estate it could put an unapportional tax upon rent of real estate and so eat all the real estate up? How can a man pay this five years' annual tax on real estate? Absolutely only out of the rental. Would any free people, if they had prohibited a land tax, submit to a tax on rentals?" (*Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, at page 540.)

In a comparatively recent case the basic doctrine of the Pollock decision, to the effect that a tax on the income from property is equivalent to a tax on the property itself, has been restated. In *Metcalf* v. *Mitchell,* 269 U. S. 514, 522 (1926), it was said by this Court:

> "* * * and when the instrumentality is of that character [having state immunity], the immunity extends not only to the instrumentality itself but to income derived from it."

For this statement this Court cited the Pollock decision and *Gillespie* v. *Oklahoma,* 257 U. S. 501 (1922). See also *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393 (1932).

While the appellant was a resident of the State of New York during the years in question (1931 and 1932), the real estate from which she derived the bulk of her income during said period was located in the State of New Jersey. In her individual returns, the appellant reported that the source of her income was the non-resident estate of Marcus Cohn, deceased, located and managed by her agents in New Jersey, and in the information returns which she filed simultaneously on behalf of the estate, she meticulously indicated the rentals of $18,897.39 for the year 1931 and $16,213.25 for the year 1932, derived through said estate from the following properties: 330 Main Street, 201 Main Street and 421 Main Street, all in the City of Paterson, State of New Jersey. The income tax forms prescribed by the appellees required that the appellant report specifically the rentals from each piece of real estate and the location thereof.

The Legislature, undoubtedly aware of the decision of the Court of Appeals in the *Pierson* case, incorporated in the amendment to the challenged act (Chap. 933, Laws of 1935, § 359), the following clause (which was implicit therein): "except only a case where the inclusion thereof would be violative of constitutional restrictions."

To the extent of the rentals from the real estate in the State of New Jersey reported by the appellant in her in-

come tax returns for the years 1931 and 1932, we submit that her income was not taxable in the State of New York and that her claims for refund duly filed under the existing law should have been granted.

POINT II

For the state of domicile to tax the income from property, intangible as well as tangible, which is physically located in or has acquired a business situs in another state, would violate the due process clause of the Fourteenth Amendment.

An intangible, the same as a tangible, can have only one situs. It cannot be in two places at the same time. An intangible with a business situs in one state is in the same category for taxation purposes as a tangible. It is not taxable in two states, and neither should the income therefrom be taxable by two states. See *Wheeling Steel Corp.* v. *Fox,* 298 U. S. 193 (1936), and cases cited therein.

The cases cited in Point I in support of the proposition that a tax on the income of property is in substance and effect a tax upon the property itself are equally applicable in support of this point. In order to avoid needless repetition, we are not citing them here.

See also

New Orleans v. *Stempel,* 175 U. S. 309 (1899);
Bristol v. *Washington County,* 177 U. S. 133 (1900);
State Board of Assessors v. *Comptoire, etc.,* 191 U. S. 388 (1903);
Metropolitan Life Insurance Co. v. *New Orleans,* 205 U. S. 395 (1907);
Liverpool & L. & G. Co. v. *Board of Assessors,* 221 U. S. 346 (1911).

In *Lawrence* v. *State Tax Commission,* 286 U. S. 276, this Court held that the State of Mississippi could tax a resident upon income from work (the construction of highways) done in the State of Tennessee. The opinion pointed out (at p. 281) that the source of the income, an intangible, was itself taxable, and said:

> "* * * It would be anomalous to say that although Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee, still, it could not tax the recipient of income upon payment of that same obligation. We can find no basis for holding that taxation of the income at the domicile of the recipient is either within the purview of the rule now established that tangibles located outside of the State of the owner are not subject to taxation within it, or is in any respect so arbitrary or unreasonable as to place it outside the constitutional power of taxation reserved to the State."

In other words, under the *mobilia* maxim the State of Mississippi had the power to tax the contract (to build roads in Tennessee); hence it could tax the income therefrom. The first part of the paragraph from which the above excerpt is taken, *i. e.*

> "It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on."

is not in harmony with the recent decisions of this Court and particularly *Senior* v. *Braden, supra,* and *Wheeling Steel Corp.* v. *Fox, supra.* Obviously, *Lawrence* v. *State Tax Commission, supra,* will be limited to the facts of that case.

All of the property of the non-resident estate of Marcus Cohn, deceased, real and personal, in which the appellant had a life estate was located and working in the State of

New Jersey, where concededly the executors were functioning since 1913 with an office at 112 Ellison Street, Paterson, New Jersey, and with the mortgage securities in a safe deposit box in the same State. All of the mortgage investments, the income from which was reported by the appellant in her information returns, were on real estate in the State of New Jersey and were invested and re-invested and all of her property managed by her agents there. In her returns, the appellant reported that she received from, or was credited with, the mortgage interest by said non-resident estate. All of the property, real and personal, and the income therefrom, in which the appellant was interested as a life tenant, had its source and fruition in the economic system of New Jersey.

We submit that the statute making such income taxable in the State of New York transcends the power of said State and contravenes the due process provision of the Fourteenth Amendment.

POINT III

Multiple state taxation contravenes the due process clause of the Fourteenth Amendment.

The State of New York, very properly, imposes a tax upon the entire net income received by natural persons not residents of the State, from all property owned by them in this State, and also upon the income derived by non-residents from every business, trade, profession or occupation carried on in said State (§ 351, Tax Law, p. 8 of this brief). But under the assailed statute, New York also taxes residents on income derived from real estate and from business with a situs in other States. Tax chaos will be the inevitable result if the other States follow the overreaching example of New York.

The power of taxation is indispensable to the very existence of the States. It is an essential function of govern-

ment. In respect to property, real and personal, and business carried on within their respective territorial limits, the power of taxation of the States, with certain limitations not material to our discussion, is absolute. Within their respective domains, they may tax directly or indirectly, lightly or heavily. If essential for governmental purposes, they may impose not only a property tax, a succession tax or an income tax, but also all three upon the same property simultaneously. *State Tax on Foreign Held Bonds,* 15 Wall. 300, 319 (1873).

This Court has pointed out that inheritance and property (intangible as well as tangible) taxes are both dependent upon jurisdiction of the property.

See:

Frick v. *Pennsylvania, supra*;
First Nat'l Bank v. *Maine,* 284 U. S. 312 (1932);
City Bank Farmers Trust Co. v. *Schnader,* 293 U. S. 112 (1934).

The State of New York has the legal power to tax any property that has a situs within its boundaries—real or personal, tangible or intangible—and it matters not whether the tax is an *ad valorem,* succession or income tax. Conversely, and regardless of whether or not the owner thereof is a resident within its domain, it has no right to tax any property, real or personal, tangible or intangible, which has a situs in another State. In short, the situs of the res, and not the domicile of the owner, is the *sine qua non* of tax jurisdiction.

The above principles are well expressed in *First National Bank* v. *Maine, supra,* at page 326, as follows:

> "It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently it became settled that the same rule applies with

respect to tangible personal property. And it now is established by the three cases last cited that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment."

See also

Pollock v. *Farmers' Loan & Trust Co., supra;*
Senior v. *Braden, supra;*
Farmers' Loan & Trust Co. v. *Minnesota, supra;*
Wheeling Steel Corp. v. *Fox, supra;*
Safe Deposit & Trust Co. v. *Virginia, supra;*
Opinion of the Justices (Mass.), *supra;*
In re Opinion of the Justices—Supreme Court of New Hampshire, *supra;*
Mayor & City Council of Baltimore v. *Gibbs,* 166 Md. 364 (1934).

Obviously, the State of New York here advocates double or multiple state taxation,—a condition making for clashing state sovereignties. The Constitution was intended to create among the States centripetal, not centrifugal, forces.

Now what would happen if the State of situs should impose a tax of 50% on income derived from property or on business done within its jurisdiction, and the domiciliary State should impose a similar tax? And let us assume further that neither State would allow as a credit or deduction* the tax paid to the other State. The two states would take the entire income for taxes. With the present tendency to increase rates of tax in all jurisdictions, such a case is by no means beyond the range of possibility and

*The allowance of a credit was held in *First National Bank* v. *Maine, supra,* not to save from unconstitutionality, and the same would seem to be true *a fortiori* of the allowance of a deduction.

emphasizes the necessity for a definite stand at this time against double taxation.

In recent years and particularly since 1930, this Court in unmistakable terms has repeatedly declared its hostility to double and multiple state taxation. With increasing vigor, the trend toward unitary taxation has progressed. While the Constitution does not in express language prohibit double taxation, it does inhibit the confiscation or taking of property without due process of law.

Indeed, multiple state taxation is doomed. As to realty, so far as we are aware, this has never been questioned. As to tangible personalty, this Court in *Frick* v. *Pennsylvania, supra,* held that a State statute attempting to tax the transfer of tangible property having an actual situs in another State, transcends the power of the State so attempting and contravenes the due process clause of the Fourteenth Amendment. Nor can an unconstitutional tax be justified by the argument that the extraterritorial property is used merely to measure the tax. *Farmers' Loan & Trust Co.* v. *Minnesota, supra,* and *Frick* v. *Pennsylvania, supra.*

Farmers' Loan and Trust Co. v. *Minnesota, supra,* explicitly over-ruling *Blackstone* v. *Miller,* 188 U. S. 189 (1903), did away with double taxation as to bonds; *Baldwin* v. *Missouri, supra,* accomplished the same result as to notes; *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1 (1930), as to credits; *The First National Bank of Boston* v. *Maine,* 284 U. S. 312 (1932), as to shares of stock.

See also:

Wheeling Steel Corp. v. *Fox, supra;*
Safe Deposit & Trust Co. v. *Virginia, supra;*
City Bank Farmers Trust Co. v. *Schnader, supra;*
Senior v. *Braden, supra;*
Farmers' Loan & Trust Co. v. *Minnesota, supra.*

In *First National Bank* v. *Maine, supra* (at p. 326), this Court stated: "The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds or property, is broader than the applications thus far made of it." In this case, the handwriting on the wall as to multiple state taxation is clearly obvious.

The *mobilia* maxim has been thoroughly emasculated. This fiction or presumption must now yield to the fact. Property, intangible as well as tangible, which has acquired an economic or commercial situs in another State no longer follows the domicile of the owner for taxation purposes. It is taxable at the situs of the property and not at the domicile of the owner; and if the State of domicile lacks the power to tax the property itself, it cannot tax the income derived therefrom. See *Pollock* v. *Farmers' Loan & Trust Co., supra,* and other cases cited in Point I (b).

POINT IV

The New York State Statute, passed May 16, 1935, in so far as it attempts to levy a retroactive tax on income received prior to 1934, was arbitrary and unconstitutional.

After the unanimous decision of the Court of Appeals in the case of *Pierson* v. *Lynch, supra,* the appellant, on April 12, 1934, in reliance thereon and in accordance with the law of the State of New York at that time, duly filed applications for refunds for income taxes paid by her for the years 1931 and 1932, on the forms prescribed by law, on the ground that the said taxes were erroneously paid or illegally collected. In acknowledging receipt of said claims for refunds, the appellees stated that "the claims for the years 1931 and 1932 will be held in abeyance pending the final determination in the case of *Pierson* v. *Lynch,* which

is to be carried to the United States Supreme Court" (R. 4-5). When this Court dismissed the *Pierson* v. *Lynch* case, the appellees wrote to the appellant on January 21, 1935, that "the Tax Commission has not as yet had sufficient time to determine the full effect of the decision in the Pierson case as affecting other taxpayers who did not join in the action. The matter is now being considered and at such time as the question is definitely decided any adjustment of the returns of the taxpayer which may be required will be made" (R. 5).

It was not until May 16, 1935, eighteen months after the decision of the Court of last resort in said State, thirteen months after appellant duly filed her application for refunds and four months after the dismissal of the *Pierson* v. *Lynch* case by this Court, that the Legislature of said State passed a law amending Section 359, Subdivision 1, of the Tax Law, which provided that the rental derived by a resident of New York State from real property located without the State of New York constitutes taxable income and made the law retroactive to 1919 and subsequent years, a period of sixteen years.

Tax laws which are retrospective are not *ipso facto* invalid. They violate the "due process clause" only when they are arbitrary, unreasonable and palpably unjust. Since the criterion is one of degree, one finds a variety of decisions, corresponding to the different types of tax involved.

The novel Federal Gift Tax of 1924 was held void as applied to a transfer made only ten days before its final enactment and after the taxing act had been introduced into Congress. *Untermyer* v. *Anderson,* 276 U. S. 440 (1928). Similarly, as to inheritance taxes, Chief Judge CARDOZO, writing for the unanimous court in *City Bank Farmers Trust Co.* v. *New York Central R. R. Co.,* 253 N. Y. 49 (1930), said at page 59 that "an act of the Legislature attempting to revoke the exemption" (from transfer tax liability) "in respect of past transactions would be a

denial of 'due process', and so of no effect." The imposition of a toll on the use of a canal two years before was likewise voided in *Forbes Pioneer Boat Line* v. *Board of Commissioners,* 258 U. S. 338 (1922).

See also:

Ettor v. *Tacoma,* 228 U. S. 148 (1913);
Nichols v. *Coolidge,* 274 U. S. 531;
Coolidge v. *Long,* 282 U. S. 582;
Blodgett v. *Holden,* 275 U. S. 142.

At the other extreme, an assessment for betterments to realty was sustained even though enacted three years after the improvement was made. *Seattle* v. *Kelleher,* 195 U. S. 351 (1904). The opinion of Mr. Justice HOLMES, unanimously concurred in, states at page 359 that "the benefit was there, on the ground, at the city's expense.", and at page 360 that "the liability is one of the notorious incidents of social life."

Perhaps the best general rule to be derived from the cases is found in the words of Mr. Justice HOLMES, in *Forbes Pioneer Boat Line* v. *Board of Commissioners, supra,* where he noted at page 340 that "the transaction was not one for which payment naturally could have been expected."

Taking this as the standard of reasonableness, what has been the practice in levying income taxes? Here again, we find a common-sense summary in the brief opinion of Mr. Justice HOLMES, dissenting from the majority opinion that ten-day retroactivity was arbitrary in taxing gifts, in *Untermyer* v. *Anderson, supra,* at page 446: "We all know that we shall get a tax bill every year. I suppose that the taxing act may be passed in the middle as lawfully as at the beginning of the year."

The dissenting opinion of Mr. Justice BRANDEIS in the same case, pages 447-449, together with the footnote thereto, contains an exhaustive analysis of the various Federal

income tax statutes from the standpoint of retroactivity, and in footnote 2(b) at page 452, a similar analysis of British income tax statutes. In most of the examples, the law was passed during the current income-tax year; in a few, and those were generally in time of war, the taxing statute was enacted in the following year, the latest date being July 4, 1864.

With this background, it is hardly necessary to argue the point that the New York State income tax statute here involved, so far as it purports to impose a tax on income heretofore exempt, retroactively over a period of sixteen years, is arbitrary and unreasonable, certainly as to income received prior to the year preceding its enactment. Income taxes are supposed to be paid out of income. Of necessity, this requires that the tax be known not later than the succeeding year. After that time, it is common knowledge that the untaxed portion of the income is devoted to other purposes, and ceases to be available for "income tax" any longer. The present statute is an example of retroactivity run wild.

CONCLUSION

The judgment appealed from should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 404.

THE PEOPLE OF THE STATE OF NEW YORK
upon the Relation of Annie Cohn,
Appellant,

v.

MARK GRAVES, JOHN J. MERRILL, and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

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On Appeal from the Supreme Court of the State of New York

APPELLANT'S REPLY BRIEF

Appellant's Basic Contention

The appellant wishes to re-emphasize this fundamental proposition: A state cannot tax land outside its borders. The *Pollock* case decided that a tax on the income from land was a direct tax equivalent to a tax on the land. Therefore, a state cannot tax the income from land located outside its borders.

The government contends that the New York income tax here imposed is an excise tax. But that is in effect the very contention rejected by the Supreme Court in the *Pollock* case. The Supreme Court decided in the Pollock case that since a tax on the income from land was a direct tax on the land, it could not be an *indirect* or excise tax.

We believe all discussion of the protection afforded by New York State as a basis for the imposition of tax on foreign realty irrelevant. Admittedly New York either gives protection or stands ready to do so. It may exact a consideration for such protection in the form of taxation. But it may not tax the income from the foreign realty. To do so is to tax the foreign realty. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429 (1895). This is plain unadorned extraterritorial taxation. Whatever tax payment New York may exact for its protection afforded and privileges granted, such tax may not take the form of a tax which is in effect a tax on foreign realty.

Appellees' Cases Distinguished

In support of their position, the appellees rely strongly upon the cases of *Lawrence* v. *State Tax Commission,* 286 U. S. 276 (1932), and *Maguire* v. *Trefry,* 253 U. S. 12 (1920). An illuminating discussion of those cases and of domiciliary income taxation is set forth by Professor Arthur Leon Harding* of Southern Methodist University School of Law, which we append to this brief (Appendix A, pp). These two cases can be clearly distinguished from the instant case.

Lawrence v. *State Tax Commission.*

The tax in that case was, as Mr. Justice STONE said, "imposed by Mississippi on its own citizen with reference to the receipt and enjoyment of income derived from the conduct of *business* regardless of the place where it is carried on." (Italics ours.) The case involved the taxation by Mississippi of the income from a contract to build roads in another state. The fact that the roads were to be built in

*Double Taxation of Property and Income, Harvard Univ. Press (1933) pages 214-229.

another state did not definitely fix a property situs in such other state. Presumably the source of income in this case was the services which followed the person of the taxpayer. This is made clear in a recent decision in *Whitney, People of the State of New York ex rel.* v. *Graves*, decided by this Court January 4, 1937. As the Court there says, we are indulging in a metaphor when we speak of the business situs of intangible property in the taxing state. We express "the idea of localization by virtue of the attributes of the intangible right in relation to the conduct of affairs at a particular place." The "dominant attribute" of the taxpayer's right in the *Lawrence* case was linked to the taxing state of Mississippi.

The stock exchange seat in the Whitney case was held to have a business situs in a state of which the taxpayer was not a resident; *a fortiori*, in the instant case, the situs of the real estate being even more definitely fixed, it has a situs in New Jersey, not New York. It follows inescapably from the Pollock decision that New York may not tax the income from such property because to do so would be taxing the property.

Maguire v. *Trefry.*

Whether or not this case has been discredited by the *Senior* v. *Braden* and other cases, there is, nevertheless, a basic point of distinction between *Maguire* v. *Trefry*, and the instant case. The income received by the taxpayer in the *Maguire* case came from a trust; the trustee received income from ~~seat~~ personal estate in Philadelphia and transmitted the income to the taxpayer in Massachusetts. An entity intervened between the personal property located in the foreign state and the taxpayer. This means that the case is not in conflict with the *Pollock* decision, which holds that a tax on income is a tax on the property from which the income is derived, and in effect forbids the tax imposed in this case. The tax in the case of *Maguire* v. *Trefry*

was not upon the income from personal property located in the foreign state but upon the income from the equitable *interest* owned by the taxpayer in a trust, which in turn owned the securities. The taxpayer in *Maguire* v. *Trefry* was not receiving income from personal or real property owned by him in Pennsylvania; he was receiving income as a result of his ownership of an equitable interest, which, as intangible property, could as well, or even more logically, have its situs in Massachusetts, the state of the taxpayer's residence, as in the foreign state. The court said, in part, at page 16:

> "It is true that the legal title of the property is held by the trustee in Pennsylvania. But it is so held for the benefit of the beneficiary of the trust, and such beneficiary has an equitable right, title, and interest distinct from its legal ownership."

In the instant case there was no intervening trustee. The taxpayer had direct legal ownership of the New Jersey real estate. She did not, as in the *Maguire* case, receive income from the ownership of an equitable right, which could be argued to have its situs in the state of taxpayer's residence.

Appellees also rely upon the following cases, which are, however, clearly distinguishable from the case at bar.

Cook v. *Tait.*

Appellees, citing *Cook* v. *Tait* (1923), 265 U. S. 47 (Brief, pp. 34-36), say: "Certainly, land in New Jersey enjoys no greater immunity from taxation by New York than does land in Mexico from taxation by the United States * * *." They conclude their argument on this proposition with the statement (Brief, p. 35) "* * * But the conclusion, that this Court could not have ruled as it did in *Cook* v. *Tait*, *supra*, with respect to Federal taxation of income from Mexican lands if the Pollock case decided that a tax on rental income was a tax on the land producing such income, is, we

submit unanswerable. (See also *Cotterman* v. *United States* [1926], 62 Ct. Claims 115, certiorari denied 273 U. S. 732.)"

This argumentation, we submit, is a superb example of a perfect *non sequitur*. The United States is not limited by the 5th Amendment in the manner in which the States are by the Fourteenth Amendment. The sovereignty of the United States is such, that unless restricted by principles of international law or by treaty, it may tax a citizen of the United States residing in Mexico on income from real and personal property permanently located within the territorial jurisdiction of Mexico or derived from sources in any country of the world. The State of New York, however, and every other State in the Union, must abide by the limitations of the Fourteenth Amendment. Of course, the Supreme Court ignored the Pollock case in its decision in *Cook* v. *Tait*, *supra*, as it had absolutely no bearing upon the issue involved. (*United States* v. *Bennett*, 232 U. S. 299.)

Central Union Trust Company v. *Wendell.*

Appellees quote (Brief, pp. 17, 18) from *Peo. ex rel. Central Union Trust Company* v. *Wendell* (1921), 199 App. Div. 131, affd. 231 N. Y. 629, in reference to the nature and effect of the New York income tax. In this case the question at issue was the taxability for income tax purposes, under the provision of Art. 16 of the Tax Law, of interest derived from bonds secured by mortgages *upon real property situated within the State of New York*, upon which mortgages a recordation tax had been paid as prescribed by the provisions of Art. 11 of the Tax Law. It is noteworthy that the appellees fail to quote the following excerpt from the opinion:

> "We are not unmindful that it has been held that a tax on income is in reality a tax on the property producing the income. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 581, 15 Sup. Ct. 673, 39 L. Ed. 759; Id. 158

U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108; Hancock Comptroller v. Singer Manufacturing Co., 62 N. J. Law, 289, 342, 41 Atl. 846, 42 L. R. A. 852; Opinion of the Justices, 220 Mass. 613, 623, 108 N. E. 570. That might be important in reference to some questions; as, for instance, if we were considering the legality of a tax on income, there being a constitutional prohibition against such tax on the principal. Our problem here, however, is one of statutory construction, and to ascertain the legislative intent, and in a problem of that nature we are not hampered by constitutional restrictions. In our view of sections 251 and 253 of the Tax Law, it is as if the Legislature had said there shall be no other tax on the principal of mortgages, except the recording tax; but we reserve the right to impose in the future, should circumstances require, a tax on the income of such mortgages. If we have properly construed such legislation the validity of the tax in question necessarily follows."

McCulloch v. *Maryland.*

We agree with the quotation from the case of *McCulloch* v. *Maryland* (1819), 4 Wheat. 316, (Brief, p. 32), but nowhere does the Chief Justice say or intimate that a State may tax a resident on extra-territorial property or on the income derived therefrom or that said property or income may be used as a measure by the domiciliary State.

Van Rensselaer v. *Dennison.*

The appellees cite the case of *Van Rensselaer* v. *Dennison,* (1850) 8 Barb. 23, and quote therefrom (Brief, pp. 33-34). This case involved the construction of a lease and has no application to the issue herein. The State of New York has a perfect right to tax real estate within its borders and also income therefrom. That is not double or multiple taxation in the sense in which we are using it. In this brief, we employ the term double taxation in the sense of multiple State taxation.

Intermingling of Income Does Not Justify Right to Tax Foreign Real Estate

Appellees make the point (Brief, p. 37) that the New York income tax reached appellant's income from the extra-territorial property after the particular item of income has lost its identity by becoming intermingled with and part of the resident's entire net income from all sources.

The same contention was raised by the Attorney General in the *Pollock* case (*supra*) and was effectively answered by the late Hon. Joseph H. Choate*, one of the eminent counsel in that case.

Business Situs in New Jersey Distinguishes This Case From Kirtland v. Hotchkiss and Justifies Non-Taxability of Interest From Bonds and Mortgages on New Jersey Real Estate.

Appellees quote (Brief, pp. 37-38) from *Kirtland* v. *Hotchkiss* (1879), 100 U. S. 491. We are in entire accord with this decision. It differs from the instant case, in that the bonds and mortgages and real estate in New Jersey in which

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"Let me call your Honors' attention again to what the learned Attorney General says. He says: 'Well, when a man has got the money in his pocket it is no longer rent.' One thing I would say about that, is that if you are going after the rent as money, the tax is on personal property and should be apportioned, as I think I shall demonstrate by and by. But the answer is that the tax does not go after the rent as money in the taxpayer's pocket. The Act of 1894, (§ 27) specifies the rents as a cardinal part and element of this income return, and every man who goes up to make his return has to state under oath what rent he got last year.

This fiction—this difference between the name and the thing, between the substance and the shadow—urged by the Attorney General is that, though you cannot tax rent, you can tax money in the owner's pocket received from rent. If there is one factitious argument, one pretense of a reason, one attempt to make a distinction without a difference that this Court has uniformly stamped upon with all its might, it is just that. This Court has repeatedly decided that such an argument is wholly unsound. * * *"

the appellant had a life interest (during her widowhood) had a business situs in the State of New Jersey. Appellant's testator died in February, 1913, in Paterson, New Jersey. Since that time the estate, managed by the three executors, of whom appellant was one, conducted the entire business of the appellant at the office of the estate in Paterson, New Jersey, managing (with all its implications) the several properties and bonds and mortgages. The agents were paid $500.00 annually (R. p. 8).

The entire managment of appellant's estate at the New Jersey office for twenty years by agents who were employed and paid by her, the fact that a New Jersey office and agents were required and the duration of said management, we respectfully submit spell out a business situs in New Jersey. The actual facts of this particular case argue strongly against the taxation imposed. Taxpayer's property, real and personal, located in New Jersey, admittedly received no protection from the State of New York. Even her mortgages could not be foreclosed in New York and no suit could be instituted in that State on bonds accompanying same, because under the law of the State of New Jersey,* no action could be brought on the bonds until the mortgages had been foreclosed.

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*N. J. Comp. Stats. Vol. 3, p. 3421.

48. *Procedure on bond where debt is not satisfied by foreclosure; limitations.*—Sec. 2. That in all cases where a bond and mortgage has or may hereafter be given for the same debt, all proceedings to collect said debt shall be, first, to foreclose the mortgage, and if at the sale of the mortgaged premises under said foreclosure proceedings the said premises should not sell for a sum sufficient to satisfy said debt, interest and costs, then and in such case it shall be lawful to proceed on the bond for the deficiency, and that all suits on said bond shall be commenced within six months from the date of the sale of said mortgaged premises, and judgment shall be rendered and execution issue only for the balance of debt and costs of suit.

Statement as to Credit and Receipt of Income

Appellees' state (Brief, p. 2), that appellant in two places in her brief states that the income under consideration was received "or credited to her account", and that they cannot discern the pertinence or importance of the quoted words; also that they are unable to find anything in the record to support any inference that the income in question was not actually received by appellant.

The income tax return forms prescribed by the appellees and filed by the appellant for the years 1931 and 1932, contained the following instruction:

> "(24) INCOME FROM PARTNERSHIPS, ESTATES, AND TRUSTS —Report your entire share (whether distributed or not) of the profits of the partnership (including salary and interest) or of the income of the estate or trust, not merely the amount withdrawn by or paid to you."

In answer thereto appellant reported the amount of her income, without specifying that any part thereof was withdrawn by or paid to her, and that the estate was "Est. of Marcus Cohn, dec'd, No. 112 Ellison St., Paterson, N. J., Annie Cohn, Executrix, same address".

The appellant's income tax returns for the years 1931 and 1932 and also her returns as executrix of the Marcus Cohn estate, although not printed in the transcript of record, were made a part of the Record (R. 13, par. 3).

The claims for refund (R., pp. 6-9), which were predicated on appellant's returns, did not indicate that she ever received a single dollar in the State of New York; and nowhere in the Record does it appear that appellant ever had a bank account in the State of New York.

An examination of each of appellant's income tax returns filed as executrix of said estate contains the following statements under DEDUCTIONS. on page 2 (18) of the return. "Commissions paid to agents for management of props—

$500." And in the claims for refund (R., p. 61, last line) and (R., p. 8, fol. 13, last line), there appears a deduction of $500 for agents.

As appears from the Record, pages 14-15, the entire income of the Marcus Cohn estate was collected by the executors of the estate, or agents of appellant, from the real estate and bonds and mortgages, physically located and secured by real estate in Paterson, N. J., where an office was maintained since 1913.

Retroactivity of the Tax

The appellees state (brief, p. 8) that the 1935 amendment imposed no new or different tax than the tax previously assessed and collected for many years. In support of this statement, appellees say:

> "* * * ever since the inception of the Income Tax Law in 1919, the State Tax Commission had imposed taxes upon income received in the form of rents from real estate located without the State."

It is obvious that the imposition of the tax by the State Tax Commission did not mean that the tax was legally imposed. The case of *Pierson* v. *Lynch,* 263 N. Y. 533, *cert. den.,* 293 U. S. 52 (193), decided, in effect, that there had never been a New York income tax on the rents from foreign real estate. The practice of the State Tax Commission must bow to the superior authority of the New York Court of Appeals. The appellees say that the retroactive amendment of the statute was for the purpose of making clear the legislative intent. Evidently, then, the legislative intent was not clear prior to this amendment. How can the government confidently and dogmatically argue that this tax has been in existence since 1919?

Appellant does not argue that all retroactive tax legislation is invalid, but only excessive, unreasonable and arbitrary retroactivity.

The recent case of *United States* v. *Hudson,* decided Jan'y 11, 1937, sets forth very clearly the principle upon which this court acts. In that case the period of retroactivity was 35 days, which this court held not unreasonable. But in the case at bar the period of retroactivity runs back sixteen years to 1919.

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Appendix A

Double Taxation of Property and Income

A study in the judicial delimitation of the conflicting claims of taxing jurisdiction advanced by the American States.

by

Arthur Leon Harding
Member of the Texas Bar
Associate Professor of Law, Southern Methodist University School of Law.

Harvard University Press
1933

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46. Domiciliary Income Taxation: The State of Decision. Judicial decisions involving the right of the domiciliary State to tax the local recipient upon income clearly from foreign sources are in a state of confusion. As we have seen, most of the cases are concerned with the hopeless task of classifying the income tax in terms of some one of the more familiar taxes, and have given little attention to the limitations implied in such classification. In these cases, the principal effort has been directed toward circumventing various constitutional provisions drafted prior to the popular acceptance of the income tax.[266] However, we have some State authority which involves directly this issue of domiciliary taxation of foreign income. In *Crescent Manufacturing Co.* v. *Tax Commission*[267] the South Carolina Court affirmed a general right of domiciliary taxation, largely upon the theory that the tax was based upon per-

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[266] These cases are collected *supra*, notes 24, 25, 27.

[267] 129 S. C. 480, 124 S. E. 761 (1924).

sonal allegiance rather than upon situs. The Mississippi Court, in two not very distinguished opinions, has reached much the same result.[268] To the contrary we have an advisory opinion of the New Hampshire Court holding that the State was without constitutional authority to tax a resident individual upon income received by him from foreign land or from chattels situated outside the State.[269] The Massachusetts Court, in the significant case of *Hutchins* v. *Commissioner of Corporations and Taxation,*[270] rejected as probably unconstitutional a statutory construction which would allow a resident trustee to be taxed upon the income from a foreign administered and foreign appointed trust. Finally, we find that the Hawaiian Court has held that the Territory is without constitutional authority to tax a resident individual upon income from credits with a business situs elsewhere.[271] These cases from New Hampshire, Massachusetts, and Hawaii were decided upon the basis of *DeGanay* v. *Lederer*[272] and the inheritance tax cases beginning with *Farmers Loan and Trust Company* v. *Minnesota,*[273] and involve reasoning very closely akin to

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[268]State v. Gulf, M. & N. R. Co., 138 Miss. 70, 104 So. 689 (1925); Lawrence v. State Tax Commission, 162 Miss. 338, 137 So. 503 (1931).

[269]In re Opinion of the Justices, 84 N. H. 559; 149 Atl. 321 (1930). See also People ex rel. Pierson v. Lynch (N. Y. App. D. 1933) 263 N. Y. S. 259, holding that a resident of New York was not there taxable on income from rental of foreign land, but that he was taxable on profit from the sale of such land. The reason for the distinction is obscure.

[270]272 Mass. 422, 172 N. E. 605 (1930); 44 *Harv. L. Rev.* 475 (1931); 31 *Col. L. Rev.* 173 (1931); 79 *U. Pa. L. Rev.* 219 (1930).

[271]Carter v. Hill, 31 Haw. 264 (1930); Hill v. Carter (C. C. A. 9th 1931) 47 F. (2d) 869; cert. den., 284 U. S. 625, 52 S. Ct. 10, 76 L. ed. 532 (1931).

[272]250 U. S. 376, 39 S. Ct. 524, 63 L. ed. 1042 (1919); *supra,* sections 38 and 39.

[273]280 U. S. 204, 50 S. Ct. 98, 74 L. ed. 371 (1930); *supra,* section 6.

that here advanced. It is also significant that the South Carolina case and the first of the Mississippi cases were decided prior to *Farmers Loan and Trust Company* v. *Minnesota*. Thus there is but the one case, *Lawrence* v. *State Tax Commission*,[274] decided in a State court after 1930 which upholds a claim of general taxing jurisdiction over income at the domicil. This case will be further discussed below.

When we turn to the United States Supreme Court cases we find that the situation is no better settled. There are two cases, *Maguire* v. *Trefry*[275] *and Lawrence* v. *Mississippi*.[276] Those we must consider in detail.

In *Maguire* v. *Trefry* the Supreme Court held that a resident beneficiary of a foreign administered trust of intangibles might be taxed upon the income received from the trust estate. To attain this result the Court advanced five different reasons:

(*a*) That the tax was essentially upon the income as property, after it actually came within the State.

(*b*) That the principles formulated in the *United Transit*[277] case did not apply to intangibles.

(*c*) That it was immaterial that this wealth was subject to taxation elsewhere; that double taxation was not violative of the United States Constitution.

(*d*) That this wealth was incident to the equitable estate of the *cestui*, which was intangible property and thus had a taxable situs at his domicil.

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[274] *Supra*, note 268.

[275] 253 U. S. 12, 40 S. Ct. 417, 64 L. ed. 739 (1920).

[276] 286 U. S. 276, 52 S. Ct. 556, 76 L. ed. 1102 (1932); affirming Lawrence v. State Tax Commission, *supra*, note 268.

[277] *Supra*, section 1.

(*e*) That the State of domicil protected the recipient of the income.

This was in 1920. To-day not a single one of these reasons is sufficient to support the tax. Taking the reasons in turn we find that much, very much, has occurred in the thirteen-year interval:

(*a*) It is admittedly the right of the State to tax income as property as soon as it comes within the State, provided of course there is no discrimination because of its extra-State origin. This, however, does not justify the taxation of the income at a rate materially different from that imposed upon other property. Nor does it justify taxation at a progressive rate rather than the flat rate ordinarily incident to the ad valorem tax. The State constitutions are sufficient to prevent such a discrimination if the income tax be treated as a mere substitute ad valorem tax,[278] and the Federal equal protection clause is becoming increasingly important in this regard.[279]

(*b*) The principles of the *Union Transit* case have, within the last few terms of court, been extended to cover a number of intangibles, and further extension along the same line seems imminent.[280]

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[278]See Eliasberg Bros. Merc. Co. v. Grimes, 204 Ala. 492, 86 So. 56, 11 A. L. R. 300 (1920). That the Alabama Court erred in its classification of the income tax seems reasonably clear. See Rottschaefer, A State Income Tax and the Minnesota Constitution, 12 *Minn. L. Rev.* 683 (1929). If, however, we assume the correctness of this classification, the decision on the uniformity issue seems sound.

[279]See Southwestern Bell Telephone Co. v. Middlekamp, 1 F. (2d) 563 (1921). This case was based upon a misunderstanding of the Missouri statute. See St. Louis San Francisco R. Co. v. Middlekamp, 256 U. S. 226, 41 S. Ct. 489, 65 L. ed. 905 (1921).

[280]*Supra*, section 6.

(c) It is now declared that double taxation of the same legal interest or wealth by two different States on the basis of conflicting theories may, if unreasonable, be opposed to the due process clause."[27]

(d) It is now held that the *cestui* of a trust in intangibles does not have a property right in intangibles which may be taxed to him at his domicil, notwithstanding that the entire value of the property has been taxed at its situs and at the domicil of the legal owner."[28]

(e) The last reason, thrown in as a sort of makeweight, was not entitled to credit at the time of the decision. The courts had held, beginning with the *Union Transit* case, that protection afforded the person of the owner could not be relied upon to establish jurisdiction to tax property actually situated outside the territorial limits of the State. Protection afforded the person is absolutely immaterial in determining a question of taxing jurisdiction over property.

It thus appears that the first reason advanced, designed to save the decision as a tax on property, encounters constitutional difficulties of equality and uniformity."[29] The next three reasons, however true they may have been in 1920, have since fallen from grace. The next and last

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[27] Farmers Loan & Trust Co. v. Minnesota, *supra*, note 273; First National Bank v. Maine, *supra*, note 227; see generally section 6.

[28] Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 50 S. Ct. 59, 74 L. ed. 180, 67 A. L. R. 386 (1929); 42 *Harv. L. Rev.* 712 (1929); 27 *Mich. L. Rev.* 827 (1929); 15 *Va. L. Rev.* 696 (1929); *supra*, sections 20 and 39.

[29] Southwestern Bell Telephone Co. v. Middlekamp, *supra*, note 279. The growing importance of the equal protection clause of the United States Constitution in matters of this sort is obvious. See Southern Railway v. Greene, 216 U. S. 400, 54 L. ed. 536, 30 S. Ct. 287 (1910); Hanover Fire Insurance Co. v. Harding, 272 U. S. 494, 47 S. Ct. 179, 71 L. ed. 372, 49 A. L. R. 713 (1926); 35 *Cal. L. Rev.* 316 (1927); 40 *Harv. L. Rev.* 777 (1927).

reason was invalid when advanced, and is still more obviously invalid to-day. The standing of *Maguire* v. *Trefry*[284] is thus rendered highly problematical, if the case has not been entirely destroyed. Certainly there is nothing about its present unenviable position to justify any great optimism as to its future. Certainly this case standing alone cannot establish a general income tax jurisdiction at the domicil. In fact it was never intended to, its principal reliance being upon the idea that the source of the income was the equitable estate of the *cestui*, which might at that time have been said to have a situs at his domicil.[285]

In *Lawrence* v. *Mississippi*[286] the question is again presented, but in slightly different form. Here the State of Mississippi sought to tax a resident of that State upon income in the form of profits accruing from a road-building contract performed in Tennessee. This was upheld in the State Supreme Court.[287] On appeal to the United States Supreme Court, counsel for the appellant unfortunately briefed the case upon a theory that the tax was a simple excise or occupation tax upon the profession of road-building. This contention the appellee refuted without great difficulty, and the decision of the lower court was affirmed, Mr. Justice Stone, for the Court, saying:

> The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection

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[284]*Supra*, note 275.

[285]*Supra*, sections 20 and 39. The faith of the Massachusetts Court in this case seems to remain unshaken. First National Bank v. Comm., ——— Mass. ———, 181 N. E. 205 (1932).

[286]286 U. S. 276, 52 S. Ct. 556, 76 L. ed. 1102 (1932); affirming, 162 Miss. 338, 137 So. 503 (1931).

[287]Upon the basis of Hattiesberg Grocery Co. v. Robertson, *supra*, note 24, and State v. Gulf, M. & N. R. Co., *supra*, note 268.

afforded to the recipient of the income by the State, in his person, in his right to receive the income, and in his enjoyment of it when received.[288]

Mr. Justice Stone's argument may be summarized as follows:

(*a*) Domicil within the State, involving the privilege of residence within the State and the right to invoke the protection of the laws of the State, constitutes a basis for taxation.

(*b*) The State is unrestricted in its taxation of those domiciled within its limits "*so long as the tax imposed is upon property within the State or on privileges enjoyed there,* and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment." (Italics ours.)

(*c*) "Taxation at the place of domicile of tangibles located elsewhere has been thought to be beyond the jurisdiction of the State;[289] but considerations applicable to ownership of physical objects located outside the taxing jurisdiction, which have led to that conclusion, are obviously inapplicable to the taxation of intangibles at the place of domicile or of privileges which may be enjoyed there."

(*d*) Whether the State calls the tax an excise or property tax is immaterial in determining whether the property or privilege is within the jurisdiction of the taxing State.

(*e*) The tax "is founded upon the protection afforded to the recipient of the income by the state, in his person, in

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[288]286 U. S. 276, at 281.

[289]Citing Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36, 50 L. ed. 150 (1905); Frick v. Pennsylvania, 268 U. S. 473, 45 S. Ct. 603, 69 L. ed. 1058, 45 A. L. R. 316 (1925); both *supra,* section 1.

his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of the income or represented by the power to control it bears a direct legal relationship."

(*f*) "It would be anomalous to say that although Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee, still, it could not tax the receipt of the income upon payment of that same obligation."

Each of these steps and reasons should be noted in detail.

If we take this reasoning, in the order in which it appears, we may make the following observations:

(*a*) We may concede with Mr. Justice Stone that domicil constitutes one basis of taxation. The difficulty we face is in defining its limits.

(*b*) We also concede the truth of the second proposition. However, the condition attached thereto is most important, and states that the tax must be based upon property within the jurisdiction of the State or upon privileges enjoyed there. Our present task is to determine whether, in the instant case, there is such property or privilege as will support this tax at the domicil.

(*c*) Here we must pause. Mr. Justice Stone takes the position that the principles which have precluded domiciliary taxation of chattels situated outside the State have no hearing on the taxation of intangibles at the domicil. This does not appear to be true. The principle which is to be deduced from the *Union Transit* and *Frick* cases would seem to be this: that where an object of wealth is found to have a situs in fact in a single place, it is not to be subjected to taxation at another place, not even at the

domicil of the owner, on the basis of legal fictions which have no relation to, or are opposed to, fact. If we re-examine *Farmers Loan and Trust Co.* v. *Minnesota,*[290] *Baldwin* v. *Missouri,*[291] and *First National Bank* v. *Maine,*[292] we find the Court announcing in each of these cases that the principle of the *Union Transit* case must now be applied to intangibles, to the end that harsh, oppressive double taxation of intangibles may be eliminated.[293] We find the Court stating in each case that it is no more possible for an intangible to have a legal situs at two places than it was possible for a chattel to be in two places at the same time.[294] Having determined in each of these cases that the principles of the *Union Transit* and *Frick* cases *did* apply to the taxation of intangibles, the Court then turned to the problem of finding the single legal situs which was to

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[290]280 U. S. 204, 50 S. Ct. 98, 74 L. ed. 371, 65 A. L. R. 1000, *supra,* sections 6 and 14.

[291]281 U. S. 586, 74 L. ed. 1056, 50 S. Ct. 436, 72 A. L. R. 1303, *supra,* sections 6 and 17.

[292]284 U. S. 312, 52 S. Ct. 174, 76 L. ed. 313 (1932), *supra,* sections 6 and 19.

[293]"Tangibles with permanent situs therein, and their testamentary transfer, may be taxed only by the state where they are found. And, we think, the general reasons declared sufficient to inhibit taxation of them by two states apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction. . . . Certainly, existing conditions no less imperatively demand protection of choses in action against multiplied taxation whether following misapplication of some legal fiction or conflicting theories concerning the sovereign's right to exact contributions." McReynolds, J., in Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, at 211. "The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property [land, chattels, bonds, notes and credits], is broader than the applications thus far made of it." Sutherland, J., in First National Bank v. Maine, 284 U. S. 312, at 326.

[294]"Due regard for the processes of correct thinking compels a conclusion that a determination fixing the local situs of a thing for the purpose of trans-

be preferred. The Court found in each case, as regards the particular property in question, debts, bonds, bank accounts, negotiable instruments, and corporate stock, that the maxim *mobilia sequantur personam* was not opposed to fact sufficiently to prevent taxation at the domicil, and that taxation at the domicil was to be preferred over taxation by a State which, although affording protection, could not establish the fact of situs therein. However, in each of these cases, as well as in *Beidler* v. *South Carolina*,[295] the Court expressly refused to state that the *mobilia* maxim was all-inclusive, and at the same time excluded or reserved from the operation of the decision the taxation of intangibles with a business situs.[296] It appears then that Mr. Justice Stone is clearly in error in concluding from these former opinions that the principles of the *Union Transit* case do not apply to intangibles, and in concluding from the same cases that the taxing power of the domicil extends to *all* intangibles.[297]

(*d*) We may well admit with Mr. Justice Stone that the particular name or title which the State may attach to the

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ferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment, within the taxable jurisdiction of as many as four states, and by each subjected to its transfer by death, an event which takes place, and in the nature of things can take place, in one of the states only." Sutherland, J., in First National Bank v. Maine, 284 U. S. 312, at 326.

[295]282 U. S. 1, 51 St. Ct. 54, 75 L. ed. 131 (1930).

[296]See generally sections 6 and 20, *supra*.

[297]Howard, Recent Developments and Tendencies in the Taxation of Intangibles, *Univ. of Mo. Law Series*, No. 44, p. 1 (1931).

tax is immaterial when passing upon the question of jurisdiction, however the case may be in connection with other questions.[298]

(*e*) Mr. Justice Stone here bases his argument upon protection afforded the taxpayer and divides this protection into three heads: protection afforded the person of the taxpayer, protection afforded the right to receive the income, and protection afforded the enjoyment of it when received. We may examine each of these heads separately.

The first, that of protection afforded the person of the taxpayer, we have seen to be of no value in determining taxable situs of property. In the first place the protection afforded the person is the same regardless of the amount of property which he may own outside the State.[299] It has been recognized that, just as the State cannot tax the individual upon chattels actually situated outside the State, it cannot accomplish this same result by taxing the individual on the basis of personal protection, but measuring the tax by the value of property outside the taxing jurisdiction of the State.[300] This fact has been the great stumbling-block of the protection theorists. It is true that protection of the person affords a basis of taxation, but it is absolutely useless in determining whether particular property is or is not within the jurisdiction of the taxing State, or in determining whether that State may or may not reach a particular source of taxation.

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[298]We have already considered the effect of the name of the statute upon the power of the State to reach income which might, for some reason other than lack of jurisdiction, be exempt from the ordinary income tax. Cases cited *supra*, notes 252-254.

[299]See *supra*, section 4, for a discussion of this protection notion.

[300]Union Refrigerator Transit Co. v. Kentucky, *supra*, note 289. See generally sections 1, 20, 31, and 44, *supra*.

The second head of protection mentioned is protection given by the State of domicil to the right to receive the income. In the first place we may well doubt whether such protection is given by the State of domicil more than by any other of the forty-eight States. It would seem that this protection would be given primarily at the place where the work was done, or where the debtor might be sued, or where the debtor has property. It is clearly settled by this time that the right to tax cannot be predicated upon the ground that the courts of the taxing State stand ready to give legal efficacy and enforcement to the obligation sought to be taxed. This theory of taxation was at the basis of the Holmesian control theory advocated in *Blackstone* v. *Miller,*[301] and has been repudiated by the cases beginning with *Farmers Loan and Trust Co.* v. *Minnesota.*[302] Thus we appear justified in stating that even if it be assumed that the State of domicil gives some special protection to the right to receive the income,—and this is by no means clear,—still this in itself is not sufficient basis for the imposition of a tax upon the thing protected.

The third head of protection mentioned is that afforded the recipient in the enjoyment of the income. We have seen above[303] that the income *when actually brought into the domiciliary State* may be subjected to the ordinary ad valorem property tax; but this will not justify the taxation of such income when brought into the State at the progressive rates found in this and other income tax statutes. It is clear that in Mississippi,[304] as in the other States, such

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[301]188 U. S. 189, 23 S. Ct. 277, 47 L. ed. 439 (1903). See generally sections 1, 6, 14, 16, and 20, *supra.*

[302]*Supra,* note 290.

[303]*Supra,* section 43.

[304]Hattisberg Groc. Co. v. Robertson, *supra,* note 24.

a tax would encounter difficulties under the equality and uniformity provisions of the State constitutions. The Mississippi Court has specifically rejected this theory of income tax as being opposed to the State Constitution.[305] The statute shows no such legislative intention. The facts of the case show nothing as to the disposition of the income after its receipt. Although the United States Supreme Court is not bound by the definitions advanced in the State courts, it would be most unusual to find the Court sustaining the statute on a theory not advanced by the State, a theory which would make the statute unconstitutional under the State's own organic law. It also seems that in treating this income tax as a tax upon the use and enjoyment of the income as property, the Court goes beyond any reasonable definition of "income" taxation.[306] It would seem clear that the right to tax the income as property, *if and when* brought within the taxing jurisdiction of the State, is not *ipso facto* equivalent to a right to tax the income when earned and received outside the State, and perhaps never brought within the jurisdiction. Any reasoning which would make the two things equivalent seems logically untenable.

(*f*) The final step in the argument is ingenious. It is important in that it reveals that in the mind of the learned Justice there is a relationship between the power to levy a property tax on the source of the income and the power to tax the income itself. This much we may concede. But does it follow from this that the State of domicil may tax income from business done elsewhere, merely because the legal right to the income rests upon promissory obligation? In the first place, we are not prepared to admit

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[305]See also State v. Gulf, M. & N. R. Co., *supra*, note 268.

[306]*Supra*, section 31. See also section 43, and note 231, *supra*.

that the domicil may tax all wealth represented by promissory obligations. We concede the power to tax only those without an actual situs elsewhere. Where the debt or other promissory obligation may be said to have acquired a business situs, a situs by economic integration, at some place other than the domicil, it would seem that under the principles of the *Union Transit* and *Farmers Loan and Trust* cases, taxation at the domicil must be abandoned.[307] Furthermore, it would seem that this obligation has a taxable situs in Tennessee, the nondomiciliary State. The taxpayer has taken himself and his property into that State and engaged in a productive activity there for a number of months. All of the property taken in would be subject to taxation in Tennessee.[308] The person of the taxpayer could be taxed in Tennessee.[309] The business or occupation within that State could be there taxed.[310] It would seem that the intangible interests which are centered about this not entirely temporary business venture within the State are sufficiently a part of this business enterprise to be *taxable* as a part of it The ordinary case of business situs involves transactions over a period of years, and involves the lending of money; but this is not the only type. Business situs may be applied to all intangibles

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[307] *Supra*, sections 6 and 20.

[308] Gromer v. Standard Dredging Co., 224 U. S. 362, 32 S. Ct. 499, 56 L. ed. 801 (1912); Hamilton Dredging Co. v. State, 99 Ala. 462, 12 So. 720 (1893); Eoff v. Kennefick Hammond Co., 80 Ark. 138, 96 S. W. 986 (1906); Griggsby Const. Co. v. Freeman, 108 La. 435, 32 So. 399 (1902); Hamilton & Gleason Co. v. Emery Co., 75 Utah 406, 285 Pac. 1006 (1930). See generally section 11, *supra*.

[309] Haavick v. Alaska Packers Assn., 263 U. S. 510, 44 S. Ct. 177, 68 L. ed. 414 (1923); Alaska Packers Assn. v. Hendeskoy (C. C. A. 9th 1920) 267 Fed. 154, cert. den., 254 U. S. 652, 41 S. Ct. 149, 65 L. ed. 458 (1920). See generally section 25, *supra*.

[310] *Supra*, section 27.

which are the normal components of a business enterprise, not entirely transitory, which has been associated with the business activity of the place so as to acquire a taxable situs therein.[311] It seems that this test has been met in the present case, although some of the facts are in doubt. If this be true, then we must reject Mr. Justice Stone's assumption that this promise would be taxable in Mississippi. Even if the facts are not sufficient to remove this promise from the taxing jurisdiction of the State of Mississippi, must we agree that the right to tax the promise is equivalent to the right to tax the income? We may assume, on the basis of *Shaffer* v. *Carter*[312] and other cases, that the State with jurisdiction to levy a property tax on the source of the income has jurisdiction to tax the income itself. Our integration principle compels this result. However, as used in the books, the *source* of the income is not identical with the legal right or power which makes the income collectible. The source seems to be the property, labor, credit, legal right, or other wealth *owned by* and *invested* by the recipient, in respect of which he first acquired the income or the right thereto. The legally accepted definition of income presupposes that the individual has previously or contemporaneously employed some wealth of *his own* in connection with the economic activity of the social group, and that the income flows from the *capital* so employed.[313] The legal definition does not include gifts. It is the capital owned by the individual recipient which we call the source of the income. In the case of income from money loaned

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[311] An example of this sort of thing is found in the corporate excess cases. *Supra*, section 18.

[312] 252 U. S. 37, 40 S. Ct. 221, 64 L. ed. 445 (1920); *supra*, sections 33 and 34.

[313] *Supra*, sections 30 and 32.

we call the debt the source of the income, since that is the thing *owned by the recipient* in respect of which the income accrues. Realistically, of course, the source may be said to be in the money originally advanced, but that money is no longer the property of the lender, and, so far as he is concerned, is not the source of the income *to him*. So, too, in the case of corporate dividends, we say that the source is the legally created status of stockholder, since that legal status is the thing in respect of which the dividends first come to the recipient. All sources prior in time represent capital of the corporation, and not of the stockholder recipient. In the case of income from the use of land or chattels, or from the sale of land or chattels, we find the source in tangible form. The capital of the recipient, invested in coordination with the wealth of others, is the land or chattels, and constitutes the source of the income. It is in respect of this wealth that the income or the right to the income first accrues to the recipient. The subsequent steps by which he reduces this income to actual possession are not sources of the income and may be disregarded. *Shaffer* v. *Carter*[314] and the other cases agree in holding the subsequent questions of collection and payment immaterial as regards taxation at the source as here defined. In the case of personal services or labor, the capital invested is the labor and personal skill. The labor and skill constitute the sources of the income. The legal device by which payment is secured is not a source of income. In short, we must remember that the jurisdictional fact is the production of the new wealth and the creation of the right thereto in the taxpayer, and is not the formality or service of reducing this new wealth to possession. If Mr. Justice Stone means that Mississippi can tax the income because it could

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[314] *Supra*, note 312.

tax the contract, and that the contract is the source of the income, he appears to be using the word source in a manner not supportable on the basis of decided cases or of sound reasoning. If, on the other hand, he means that Mississippi, because of its control over the enforcement of the contract, can tax the income, even though the contract be not the source of the income, he is skating dangerously close to the now repudiated Holmesian idea that the power to control or to interfere with the enforcement of legal rights gives the right to tax the wealth represented by those rights. On the basis of these observations, then, it seems that the disarming declaration that "it would be anomalous to say that Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee, still, it could not tax the receipt of the income upon payment of that same obligation," when examined in the light of the facts, and long settled and recently reaffirmed legal principles, carries no great amount of conviction.

On the whole, then, the *Lawrence* case does not appear to be acceptable. It has been pointed out that counsel made the unfortunate mistake of predicating his appeal on the theory that the Mississippi income tax statute was no more than an excise or occupation tax. This position was easily defeated. However, the real reason for the confusion must be found in the fact that the opinion was written by a judge whose individual views condone the older theories, with their attendant confusion and double taxation. Mr. Justice Stone, it will be recalled, wrote a dissenting opinion in *Baldwin* v. *Missouri*,[315] and wrote concurring opinions in, but disagreed with the reasoning in, *Safe Deposit and Trust Company* v. *Virginia*[316] and *Farmers Loan and Trust*

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[315] *Supra*, note 291.

[316] *Supra*, note 282.

Company v. *Minnesota*.[317] In these opinions he did not make himself entirely clear, but embraced first the protection theory of taxation, and then the control doctrine. However ambiguous he was on these issues, nevertheless it is clear that he stood for double taxation on the basis of legal fictions which are here believed to be untenable. The same confusion appears in his opinion in the *Lawrence* case, where, as we have seen, he argues for the tax on one point on the basis of protection, and on another on the basis of a legal power of control. The new and salutary principles found in the cases in which he dissented, he ignores. In view of these facts, it is not believed that the opinion, that is, the language in the opinion, can be taken as expressing accurately the settled conviction of the Supreme Court.[318]

When we review the cases on this point of domiciliary taxation of income, we find cases from two States[319] and from one Territory,[320] all decided after *Farmers Loan and Trust Company* v. *Minnesota*, which indicate that the domiciliary State is without power to tax income received from sources in another State, and there taxable. The reason-

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[317] *Supra*, note 290.

[318] One is reminded of a similar instance of recent occurrence. For twenty-five years after the decision in Smythe v. Ames, 169 U. S. 466, 18 S. Ct. 418, 42 L. ed. 819 (1898), the Supreme Court very carefully and forcefully refused to state that the present cost of reproduction less depreciation was a final criterion of the validity of rates to be charged by a public service company, only to have Mr. Justice Butler, in an inconspicuous portion of Indianapolis Water Company v. McCardle, 272 U. S. 400, 47 S. Ct. 144, 71 L. ed. 316 (1926), employ language which completely upset the apple-cart. The cart was righted at the next opportunity. St. Louis & O'Fallon R. Co. v. United States, 279 U. S. 461, 49 S. Ct. 384, 73 L. ed. 798 (1929).

[319] Hutchins v. Commr., *supra*, note 270; In re Opinion of the Justices, *supra*, note 269. See also People ex rel. Pierson v. Lynch, *supra*, note 269.

[320] Carter v. Hill, *supra*, note 271.

ing of those cases is here approved. Two of the three cases, it is interesting to note involved intangibles. Opposed to this view we find no creditable State authority. The South Carolina Court reached the position upholding the right to tax, but the case was decided prior to both *Farmers Loan and Trust Company* v. *Minnesota* and *Frick* v. *Pennsylvania*. Its reasoning will hardly stand examination in the light of those two Supreme Court cases. The Mississippi Court reached the same result. In the first[321] of the cases the opinion is beclouded with vain attempts to classify the tax in the existing schemes. The second[322] case is very much muddled up with a question as to the effect of a statute exempting domestic corporations from taxation on income from foreign sources. The real authority in favor of domiciliary taxation of income from sources taxable abroad is to be found in *Maguire* v. *Trefry*[323] and in *Lawrence* v. *Mississippi*.[324] We have seen that the reasoning of the first of these cases has been almost, if not entirely, cut away by subsequent decisions. We have indicated above many vital objections to *Lawrence* v. *Mississippi*. It would appear, then, that the question is far from being settled.

Fortunately the more enlightened courts in the United States have passed beyond the older English idea that a precedent, once established, must stand until changed by a higher court or by a valid statute.[325] In this country we have tended more and more to look to the reasons back of

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[321]State v. Gulf, M. & N. R. Co., *supra*, note 268.

[322]Lawrence v. State Tax Commissioner, *supra*, note 268.

[323]*Supra*, note 275.

[324]*Supra*, note 286.

[325]Salmond, *Jurisprudence* (7th ed., 1924), pp. 187-206. See Great Western Ry. Co. v. Owners of S. S. Mostyn, [1928] A. C. 57.

the precedent, to the justice inherent in it, to the history of such affairs since the date of the precedent, and to the social effect of its existence, before we decide that it is to remain inviolable.[326] If the particular precedent is unreasonable or unjust, and if the social consequences of repudiating it do not outweigh the benefits to be derived from change, we have no great hesitation about discarding it, except that we are loathe to change a precedent, not too outrageous, where it has formed the basis of a well-established custom of the community, or where it forms the basis for well-established property rights.[327] The willingness to change is particularly important in the field of constitutional law. Here we deal with vital questions of policy, in the face of ever-changing social conditions. If the Court err, there is no quick relief by statute, only the cumbersome method of constitutional amendment. A strict rule of

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[326]"A decided case is worth as much as it weighs in reason and righteousness and no more. It is not enough to say 'thus saith the court.' It must prove its right to control in any given situation by the degree in which it supports the rights of a party violated and serves the cause of justice as to all parties concerned." Wanamaker, J., in Adams Express Co. v. Beckwith, 100 Ohio St. 348, 352, 126 N. E. 300 (1919). "There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years." Cardozo, *Nature of the Judicial Process* (1921), p. 151.

[327]"If, after thorough examination and deep thought, a prior judicial decision seems wrong in principle or manifestly out of accord with modern conditions of life, it should not be followed as a controlling precedent, where departure therefrom can be made without unduly affecting contract rights or other interests calling for consideration." Von Moschzisker, Stare Decisis in Courts of Last Resort, 37 *Harv. L. Rev.* 409, 414 (1924). "Precedents, and especially the precedent of a single case, will no longer be considered a binding source of law which judges must accept under all circumstances. Only if decided cases have created a practice upon which laymen have relied, will the American courts feel that they are bound to follow them. This, as I

stare decisis in matters of this sort would be intolerable.[328] The judicial method of the Supreme Court is becoming more and more one of trial and error, of judicial approximation to the spirit of the times, and of judicial satisfaction of the valid demands of the times. We have witnessed that judicial groping for truth in the matter of taxation in the long period from 1905 to 1930, and have seen the Court in 1930 formulate its conclusions, sweep the books clear of confused precedent, and set out upon the track which it believes to be sound. The opinion in *Lawrence* v. *Mississippi*[329] represents another effort to get on solid ground, but it falls short. There is no reason to believe that its mistaken inferences will be allowed to deter the Court from following the path blazed in the cases of this and the two terms next preceding.[330]

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have attempted to show, is the doctrine of the civil law and directly contrary to that of the English law with its insistence upon the need for certainty. I therefore believe that, as concerns the fundamental doctrine of precedent, English and American law are at the parting of their ways." Goodhart, *Essays in Jurisprudence and the Common Law* (1931), p. 74.

[328]"A series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal. The course of policy pursued by any country in relation to, and promoting the interests of, its commerce must, as time advances and as its commerce thrives, undergo change and development of the action of its Courts." Watson, L. J., in Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co., [1894] A. C. 535, 553, cited by Goodhart, *op. cit., supra*, note 327, at 67-68.

[329]*Supra*, note 286.

[330]See *infra*, note 422.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 404.

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. ANNIE COHN,
Appellant,

against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEES.

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THE PEOPLE OF THE STATE OF NEW YORK,
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against

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,
Appellees.

BRIEF FOR APPELLEES.

Statement.

This cause comes to this Honorable Court on appeal from a final order and judgment of the Supreme Court of the State of New York pursuant to the provisions of Section 237-a of the Judicial Code, as amended. The final order (R. 32) and judgment (R. 34) appealed from were duly entered on July 14, 1936, and August 18, 1936, respectively, in the office of the Clerk of Albany County, New York, upon the remittitur of the Court of Appeals (R. 30) bearing date July 18, 1936.

The questions presented are whether the State of New York may constitutionally include in the measure of its income tax imposed upon a resident of New York,

(1) income derived from rentals from real property located in New Jersey, and

(2) income derived from bonds and mortgages which are liens upon real estate located in New Jersey, and which bonds and mortgages are physically held or deposited in New Jersey.

Official Report of Opinions Below.

The official reports of opinions filed in the courts below are correctly set forth in appellant's brief.

Statement of Facts.

With certain reservations and exceptions here noted, we adopt the statement of facts set forth at pages 3 to 6 of appellant's brief.

It is said in two places on page 3 of appellant's brief that the income here under consideration was received "or credited to her account." We fail to appreciate the pertinence or importance of the quoted words but, in any event, we are unable to find anything in the record to support any inference that the income here in question was not actually received by appellant. The actual income tax returns filed by appellant are not reproduced in the record and there is nothing to indicate that those returns were computed on an accrual basis rather than a cash basis. On the contrary, the applications for refund (R. 6 to 9) indicate that the income actually was received.

On page 4 of appellant's brief it is said:

> "Since 1913, David Cohn and Maurice Cohn always acted as the agents of the appellant in the State of New Jersey, managed the aforesaid properties besides collecting the rents, collected the interest and the amortization payments on the bonds and mortgages, invested and reinvested same in the State of New Jersey, and received an annual compensation therefor."

There is absolutely no warrant for this statement from anything that appears in the record or that may reasonably be inferred. It is significant that appellant's statement of facts generally is supported by folio references to the record and that the statement to which we take serious exception is devoid of any such reference.

Concededly, David Cohn, Maurice Cohn, and appellant were the executors of the estate of Marcus Cohn, appellant's deceased husband, and appellant by the terms of her husband's will was the beneficiary during widowhood of the entire net income of her husband's estate, but the record is utterly devoid of anything to support the statement that David Cohn and Maurice Cohn were the agents of appellant in managing the assets of the estate and received annual compensation therefor, presumably from appellant.

The Statute.

Believing that the Court will wish to familiarize itself with the nature and effect of the New York Personal Income Tax, we have appended to this brief (Appendix A, pp. 44 to 106) the full text of Article 16 of the Tax Law, as the same was added by Chapter 627

of the Laws of 1919 and as amended through 1935, with the exception of Sections 351-b, 351-c, 351-d, 351-e and 351-f, which sections relate to temporary emergency increases and which, we believe, have no pertinence here.

Summary of Argument.

I. The 1935 Amendment to Section 359 of the Tax Law (Ch. 933, L. 1935), was a valid exercise of legislative authority, and the Legislature had authority to give the act retrospective operation.

II. The nature, character and effect of the New York Personal Income Tax is such that no constitutional infirmity arises from the imposition of the tax upon a resident of New York where the tax is measured by the resident's entire net income which may be derived in part from sources without the State.

III. An income tax, measured by a resident's entire net income, including rent from real property located elsewhere, involves no infringement of the taxpayer's rights under the Constitution of the United States.

IV. The State may include in the measure of a resident's income tax, interest derived from debts, evidenced by bonds of non-residents and secured by mortgages on real estate located in another State; and this, though the bond and mortgage be held or deposited in such other State.

V. Conclusion.

I.

The 1935 Amendment to Section 359* of the Tax Law (Ch. 933, L. 1935), was a valid exercise of legislative authority, and the legislature had authority to give the act retrospective operation.

In 1933 there was presented, in the case of *People ex rel. Pierson v. Lynch,* 237 App. Div. 763, 263 N. Y. 533, 293 U. S. 52, the question whether the State could legally impose its income tax upon a resident, with respect to income derived in part from rentals of Ohio property and in part from profits from the sale of such Ohio property. The imposition of such a tax was assailed both as a matter of statutory construction and upon the ground that it was violative of the Constitution of the United States. On March 15, 1933, the Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, rendered its decision (237 App. Div. 763), Presiding Justice Hill writing for a majority of the Court, and Justices Bliss and Rhodes dissenting, holding that the State could not impose an income tax on the rentals from the Ohio land, but that income derived in the form of profits from the sale of such property was subject to the tax, which was considered an excise.

It was our belief at the time that the Court based its decision, with respect to the rentals, upon a construction of the Constitution of the United States. That we were correct in this view is attested by the words of Mr. Justice Hill in the opinion in the instant case when he says (R. 21) that the Appellate Division

* See Appendix A, p. 44.

> "decided that case *(Pierson)* solely upon the ground that under the Fourteenth Amendment to the Federal Constitution it was not within the power of a state, irrespective of the wording of the statute, to tax a resident of the state on account of rentals or income received from land located beyond its borders."

From that portion of the decision which held that a tax could not be imposed upon the rentals from Ohio land, the State Tax Commission appealed to the Court of Appeals and, on November 21, 1933, that Court unanimously affirmed the order appealed from, without opinion (263 N. Y. 533).

The State Tax Commission thereupon made application to this Court for a writ of certiorari to review the determination of the Court of Appeals and, on April 2, 1934, this Court granted the application (292 U. S. 616). The taxpayer opposed the granting of the writ, urging that the record did not show that a Federal question had expressly or necessarily been decided by the State Court.

Upon the oral argument before this Court, the taxpayer renewed such objection to the Court's jurisdiction and, on November 5, 1934, this Court vacated the writ of certiorari theretofore granted as having been improvidently granted, Chief Justice Hughes writing the Court's opinion (293 U. S. 52). The following quotation from that opinion clearly sets forth the basis of the Court's decision:

> "That court, [Appellate Division] while citing decisions of this court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the

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* See Appendix A, p. 44.

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> "That court, [Appellate Division] while citing decisions of this court under the Fourteenth Amendment, did not state that its decision rested upon the application of the Constitution of the

United States. The Court of Appeals of the State affirmed the order of the Appellate Division, but without opinion, 263 N. Y. 533; 189 N. E. 684, and the grounds of its decision are left to conjecture. It may be surmised, from the quotations in its opinion, that the Appellate Division intended to rest its decision upon a determination of the application of the Fourteenth Amendment, and that the affirmance by the Court of Appeals went upon the same ground, and not upon the non-federal ground of the application of the Constitution and laws of the State. But jurisdiction cannot be founded upon surmise."

Following the decision of this Court, the State Tax Commission addressed a motion to the Court of Appeals for a reargument or, in the alternative, to amend the remittitur to indicate that its decision was based upon a construction of the Constitution of the United States. The purpose of this motion was, of course, to give this Court jurisdiction of the case. On December 4, 1934, the Court of Appeals denied the motion (266 N. Y. 431), thereby indicating that its affirmance of the order of the Appellate Division might have been based upon a statutory ground rather than upon a construction of the Constitution of the United States or of the State of New York.

For the purpose of removing any possible doubt of the legislative intent, and for no other purpose whatsoever, section 359 of the Tax Law was amended by Chapter 933 of the Laws of 1935 and, as so amended, was given retrospective operation to January 1, 1919. This reason for the amendment was recognized by the Appellate Division when, in the opinion in the instant case (R. 21) by Presiding Justice Hill, it was said:

> "The 1935 amendment (Chap. 933 Laws 1935) only makes more definite and certain the meaning which we gave Section 359 in deciding the Pierson case, and does not detract from the force of that authority."

See also dissenting opinion of Judge Hubbs in the Court of Appeals in the instant case (R. 25).

Consistently, ever since the inception of the Income Tax Law in 1919, the State Tax Commission had imposed taxes upon income received in the form of rents from real estate located without the State. The 1935 amendment, therefore, imposed no new or different tax than had been previously assessed and collected for many years and, as we have indicated, was solely for the purpose of making plain the legislative intent.

The general rule is well settled that retroactive taxation is permissible. Thus, in the case of *Milliken v. United States,* 283 U. S. 15, Mr. Justice Stone said, page 21:

> "But a tax is not necessarily and certainly arbitrary because retroactively applied, and taxing acts having retroactive features have been upheld in view of the particular circumstances disclosed and considered by the court."

And in *People ex rel. Best & Co., Inc. v. Graves,* 265 N. Y. 431, Judge Lehman said, page 436:

> "The intention of the Legislature to make the amendment retroactive stands unquestioned and that intention must be given effect unless it transcends the constitutional powers of the Legislature."

Judge Lehman also referred to the analysis made by Mr. Justice Brandeis in his dissenting opinion in

Untermeyer v. Anderson, 276 U. S. 440, of cases involving retroactive tax statutes and said (page 436) that those cases "leave no doubt that the rule is that no limitation upon the legislative power to impose a tax excludes the power to give retroactive effect to a tax law. Legislative power does not, however, include the power to take private property arbitrarily, whether through exercise, of the power of taxation or otherwise. *Thus, only a retroactive application of a tax law which would result in the taking of property arbitrarily is beyond the power of any legislature.* On challenging a tax it does not suffice to say that it is imposed because of transactions or conditions which antedate the statute. It is necessary to consider the nature of the tax and of these acts and conditions." (Emphasis ours.)

The situation in the instant case is, however, very much simpler. Appellant voluntarily filed income tax returns for 1931 and 1932 in which she included the items of income here in question as part of her gross income and voluntarily paid the taxes revealed by her own computation, all pursuant to the then provisions of the Tax Law. Liability for such tax payments was fixed by the then law and was not increased by the 1935 amendment. The purpose of that amendment was, as we have said, simply to clarify the legislative intent and to permit the question of the State's power to tax income from rents of foreign real property, to be tested solely under the Constitution of the United States.

II.

The nature, character and effect of The New York Personal Income Tax is such that no constitutional infirmity arises from the imposition of the tax upon a resident of New York where the tax is measured by the resident's entire net income which may be derived in part from sources without the State.

Many and varied are the views upon the nature of a state income tax. Having in mind that this Court has said on more than one occasion that taxation is an intensely practical matter and that the resultant effect of a tax is what matters rather than what the tax is called, we shall emphasize the general effect of the tax rather than its nomenclature. Some observations as to the nature and character of the tax, however, seem pertinent.

We are indebted to Professor Robert C. Brown of Indiana University School of Law for a most interesting and discursive article entitled "The Nature of the Income Tax" (17 Minnesota Law Review 127), which we append to this brief (Appendix B, pp. 107 to 132). Professor Brown refers to Cooley on Taxation, 4th ed., vol. 1, §38 where it is said that there are three kinds of taxes, (1) capitation or poll taxes, (2) property taxes and (3) excise taxes, and, though finding an income tax to be closest in analogy to an excise tax, Professor Brown concludes that the "fundamental nature of the income tax is, in short, that it is an income tax and nothing else." The inference is that a fourth kind of tax exists and is an income tax.

We share Professor Brown's view that an income tax is *sui generis* and entitled to a classification by itself. Income taxes existed, in one form or another, in the earlier days of our national life. Following the Civil War the Federal Government resorted to income taxes to replenish the national treasury and such taxes came to be regarded as excises. In 1894, a comprehensive Federal income tax was enacted but was held unconstitutional. Following the adoption of the Sixteenth Amendment, a Federal income tax was enacted and has been in operation ever since. With respect to state income taxes, Wisconsin pioneered in 1911, New York enacted hers in 1919 and, at the present time some 32 states have adopted income tax statutes. The difficulties involved in choosing the exact category of an income tax and the conflicting views on the subject compel us to the conclusion that the tax is sufficiently important and unique to enjoy a class by itself.

We do believe, however, that the New York tax, at least, bears a closer analogy to an excise than seems possible to Professor Brown. Thus, he finds the decision in *Pollock v. Farmers Loan & Trust Co.* (1895), 157 U. S. 429; 158 U. S. 601, "an insuperable objection to this theory." The objection would seem not to be insurmountable in view of the words in *Brushaber v. Union Pac. R. R.* (1916) 240 U. S. 1, at p. 16:

> "Moreover in addition the conclusion reached in the *Pollock Case did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property,* but on the contrary recognized the fact that *taxation on income was in its nature an excise* entitled to be enforced as such unless and until it was concluded that to enforce it would amount to accomplishing the result which the requirement as

> to apportionment of direct taxation was adopted to prevent, in which case the duty would arise to disregard form and consider substance alone and hence subject the tax to the regulation as to apportionment which otherwise as an excise would not apply to it." (Emphasis ours.)

In addition, our income tax resembles an excise in another vital particular, *i. e.*, in the manner in which it is laid. This Court in *Society for Savings v. Coite* (1868), 6 Wall. 594, said, in effect, that an excise and a property tax, when the two approach each other, ordinarily may be distinguished by the respective methods adopted of laying them and fixing their amounts. If a tax is imposed directly by the legislature without assessment, and its sum is measured by the amount of business done or the extent to which the conferred privileges have been enjoyed or exercised by the taxpayer, irrespective of the nature or value of the taxpayer's assets, it is regarded as an excise; but if the tax is computed upon a valuation of property, and assessed by assessors either where it is situated or at the owner's domicile, although privileges may be included in the valuation, it is considered a property tax.

And in Cooley on Taxation, 4th ed., vol. 1, §45, we find:

> "Another thing to be noted, it has been said, is that the obligation to pay an excise tax is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege, or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand, as in the case of a property tax, is lacking."

In these respects, our income tax closely resembles and operates as an excise. There is the same uncertainty of incidence, the same lack of absolute and unavoidable demand, the same indifference to the nature and value of the taxpayer's assets and the same absence of assessment by assessors. We should think that the principal objection to classifying an income tax precisely as an excise is the difficulty of defining the act, privilege or occupation on which to base the excise.

Nevertheless, as recently as 1931, this Court in *Willcutts v. Bunn*, 282 U. S. 216, made repeated reference to the Federal income tax as an excise and in *People ex rel. Clark v. Gilchrist* (1926), 243 N. Y. 173, Judge (now Mr. Justice) Cardozo noted that the New York Personal Income Tax Law was framed upon the model of the Federal Income Tax Act, though differing in some particulars. In *People ex rel. Pierson v. Lynch* (1933), 237 App. Div. 763, the Court denoted our income tax, in so far as it included income from the profitable sale of Ohio real estate, an excise. See also *Springer v. United States* (1880), 102 U. S. 586.

Mississippi's income tax, as applied to a resident's income from business activities conducted without the state, was under consideration in *Lawrence v. State Tax Commission* (1932), 286 U. S. 276. It was held that the tax, as there imposed, was not in contravention of any constitutional provision. This Court referred to the definition of the tax by the Supreme Court of Mississippi as an excise and not a property tax but said that in passing on its constitutionality, concern must be had only with the practical operation, not with

its definition. Concerning the fundamental authority and justification for the tax Mr. Justice Stone, writing for this Court, said, p. 279:

> "The obligation of one domiciled within a state to pay taxes there, arises from unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equitably among those who enjoy its benefits. *Hence domicile in itself establishes a basis for taxation.* Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government." (Emphasis ours.)

And, further, p. 280:

> "It is enough, so far as the constitutional power to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship. It would be anomalous to say that although Mississippi may tax the obligation to pay appellant for his services rendered in Tennessee, still, it could not tax the receipt of income upon payment of that same obligation. *We can find no basis for holding that taxation of the income at the domicile of the recipient is either within the purview of the rule now established that tangibles located outside the state of the owner are not subject to taxation within it,* or is in any respect so arbitrary or unrea-

> sonable as to place it outside the constitutional power of taxation reserved to the state." (Emphasis ours.)

Oklahoma's income tax, as imposed upon non-residents with respect to income derived from any business, trade, profession or occupation carried on within the state, was under review in *Shaffer v. Carter* (1920), 252 U. S. 37 and was upheld by this Court. While open, perhaps, to the objection of being *dicta*, it was said by this Court, p. 57, that the tax as imposed upon residents "includes all income derived from their property and business within the state *and, in addition, any income they may derive from outside sources.*" (Emphasis ours.)

And, again, it was said, p. 57:

> "As to residents it [the state] may, and does, exert its taxing power over their *income from all sources, whether within or without the state*, and it accords to them a corresponding privilege of deducting their losses, wherever they accrue." (Emphasis ours.)

In *Shaffer v. Carter, supra*, reference is also made to the fact that income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily apportioned to their ability to pay.

The Massachusetts income tax, as applied to the income of a resident derived from a testamentary trust comprised of personalty having its situs in Pennsyl-

vania, was upheld in *Maguire v. Trefry* (1920), 253 U. S. 12. This case was distinguished in *Senior v. Braden* (1935), 295 U. S. 422, on the ground that the tax involved in the *Maguire* case was an income tax and, while certain cases cited in the *Maguire* case have been overruled, the result is still sound. This Court quoted with approval from the opinion of the Massachusetts Supreme Judicial Court, as follows, p. 14:

> "The income tax is measured by reference to the riches of the person taxed actually made available to him for valuable use during a given period. It establishes a basis of taxation directly proportioned to ability to bear the burden. It is founded upon the protection afforded to the recipient of the income by the government of the Commonwealth of his residence in his person, in his right to receive the income and in his enjoyment of the income when in his possession. That government provides for him all the advantages of living in safety and in freedom and of being protected by law. It gives security to life, liberty and the other privileges of dwelling in a civilized community. It exacts in return a contribution to the support of that government measured by and based upon the income, in the fruition of which it defends him from unjust interference."

This reasoning, similar to that in *Lawrence v. State Tax Commission* and in *Shaffer v. Carter, supra,* coincides with the views of the celebrated economist, Adam Smith, who wrote, in that part of his work, Wealth of Nations (1776), having to do with taxation:

> "The subjects of every state ought to contribute towards the support of the government, as nearly as possible, in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the state."

In *United States Glue Company v. Oak Creek* (1918), 247 U. S. 321, it was held that the Wisconsin income tax, laid upon the gains and profits of a domestic corporation including net income from transactions in interstate commerce, did not contravene the commerce clause of the Constitution of the United States. This because, p. 329:

> "Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the States."

New York's income tax, as originally enacted, came before this Court in *Travis v. Yale & Towne Mfg. Co.* (1920), 252 U. S. 60. Only the provision having to do with the allowance of personal exemption was under review; as then constituted, it was found to discriminate against non-residents. The defect has since been remedied. In so far as jurisdiction to tax was concerned, the cause was controlled by the decision in *Shaffer v. Carter, supra,* decided the same day by this Court.

The nature and effect of the New York income tax has been considered and defined by the New York Courts in *People ex rel. Central Union Trust Co. v. Wendell* (1921), 197 App. Div. 131, affd. 231 N. Y. 629 as follows, p. 135:

"There is still another view to take of this question. *The income tax is not directly at least imposed on any particular income.* The recording tax is imposed on the mortgage (§253); the income tax is imposed on the individual. It is 'imposed upon every resident of the State' (§351). *His income is used only in fixing the measure of such tax.* It is the net income on which the tax is computed (§351). The 'net income' means the 'gross income' of the taxpayer less legal deductions (§357) and in determining the 'gross income' mortgage interest as well as all other income is included with numerous exceptions specified in section 359. From such 'gross income' thus determined are to be subtracted numerous deductions (§360) and also certain exemptions (§362) before the tax is computed. *Hence the income from any particular source is but one element to be considered in connection with other elements in determining the measure of the taxation which is imposed on the individual. In no proper sense may it be said that the tax is imposed on the interest of any particular mortgage.* That is merely a factor in the determination of the amount of such taxation." (Emphasis ours.)

Similarly, in *Peck v. Lowe* (1917), 247 U. S. 165, this Court said (p. 174) that an income tax was not laid upon income "because of its source, or in a discriminatory way, but just as it is laid on other income," and that the tax was both nominally and actually a general tax laid upon net income arising or accruing from all sources without discrimination, the *source* of the income being affected but *indirectly* and *remotely,* for the reason that the tax was levied "after the recipient of the income is free to use it as he chooses."

Coming to consider the practical application and effect of our income tax, we place no reliance upon the

statutory provision (§363 Tax Law) allowing a reciprocal credit to non-residents for income taxes paid to the state of their residence, as validating a tax which might otherwise be invalid. It is, however, more than likely that New Jersey, should she enact an income tax law, would adopt the model law sponsored by the National Tax Association which contains a reciprocal credit provision similar to that in the New York law.

Travis v. Yale & Towne Co. (1920), *supra*, 252 U. S. 60.

We are also aware of the trend of the decisions of this Court limiting, with respect to property and succession taxes, the taxing power of both a domiciliary and a non-domiciliary state.

Safe Deposit & Trust Co. v. Virginia (1929), 280 U. S. 83,

Farmers Loan & Trust Co. v. Minnesota (1930), 280 U. S. 204,

Baldwin v. Missouri (1930), 281 U. S. 586,

Beidler v. South Carolina (1930), 282 U. S. 1.

First National Bank v. Maine (1932), 284 U. S. 312,

Senior v. Braden (1935), 295 U. S. 422.

Wheeling Steel Corp. v. Fox, (1936). 298 U. S. 193.

Based largely on her conception of these decisions, appellant makes the dogmatic statement (p. 20 of Appellant's Brief) that "multiple state taxation contravenes the due process clause of the Fourteenth Amendment," which is saying a great deal more than we have ever understood this Court to hold. Such a

conclusion requires a defining of what exactly constitutes double or multiple taxation, which, in specific cases, may be simple enough but, as a generic term, defies exact definition. We readily concede, as indeed we must, that these cases have the effect of limiting, in the case of property taxes and inheritance taxes, taxation of intangibles to the domiciliary state except where localized in another state and, then, limiting taxation to such non-domiciliary state. We hope to persuade this Court that an income tax is so vitally and organically different from a property or inheritance tax that more liberal taxing powers should there be tolerated.

With reference to the New York Personal Income Tax, Section 351 of the Tax Law imposes an income tax at specified rates "upon every resident of the state" with respect to his entire net income. By section 357, the term "net income" means the gross income of the taxpayer less the statutory deductions which include (section 360) expenses, interest payments, certain taxes, losses, worthless debts, depreciation, depletion and obsolescence and certain contributions and gifts. In addition, by section 362 certain purely personal exemptions are allowed, depending for their amount upon whether the taxpayer is married or single and the number of his children or dependents.

Section 359 defines "gross income" as including, among other things, gains, profits and income derived from dealings in real or personal property, whether located within or without the state; also interest and rent, including rent derived from real property situated outside the state. The legislative intent is plain-

ly stated as including "all of the foregoing items, without regard to the source thereof, location of the property involved, or any other factor, except only a case where the inclusion thereof would be violative of constitutional restrictions."

The tax is, with respect to residents, as denominated, a tax upon the person and is measured by the amount of his entire statutory net income, which reflects the amount of income, after deduction of all losses and expenses incurred in producing it, which he is able to take to himself here and use as he chooses. The tax is general and non-discriminatory and, being graduated and subject to certain personal exemptions, is carefully proportioned to the ability of the individual to respond to the necessary costs of government.

From the standpoint of the taxpayer, the source of any particular item of income is immaterial since the tax is general and has incidence only provided his entire net income, as computed on the last day of the calendar year or fiscal year, exceeds the statutory personal exemptions. The tax is payable 3½ months after the close of the tax year (§ 371). The source of a taxpayer's income is material only when the tax may burden or impede the usual governmental functions of the United States or may diminish the salary of a state officer enjoying constitutional protection against diminution of his salary.

Thus, a resident may own all of the land in one of New Jersey's counties and if it produces no income, no tax results. Nor does the tax have incidence if New Jersey property produces net income to a New York

resident, but is offset by losses sustained elsewhere so that no entire net income results. Furthermore, a New York resident owning New Jersey real estate would be entitled to deduct from his gross income losses sustained in connection with his New Jersey property (§353) and taxes paid thereon (§360, subd. 3). In no event could the tax attach to or become a lien upon the property; on the contrary the tax is specifically made a personal debt of the taxpayer (§352). Indeed, it is conceivable and frequently occurs that the property producing income subject to the tax has long been disposed of when the tax is computed or becomes payable.

Thus, the income tax differs vitally from a property tax or an inheritance tax. Such taxes have certainty of incidence dependent upon the ownership or the transfer of property and attach to and become liens upon the property. The income tax has no certainty of incidence and in no way affects the property except as it may be said remotely and indirectly to burden it.

So-called double or multiple taxation, prior to 1930, was genuinely vexatious in the case of inheritance taxation. The ownership of a single share of stock in a decedent's estate could, and frequently did, require tax proceedings in a number of states and result in a multiplicity of taxes, making the cost of effecting a transfer perhaps exceed the value of the property. Reciprocal exemptions enacted by the several states were relieving the situation somewhat but the final solution came about through the decisions of this Court beginning with *Safe Deposit & Trust Co. v. Virginia, supra,* and completed in *First National Bank v.*

Maine, supra. Property taxes assessed upon intangible personal property were perhaps less onerous, but being taxes *in rem*, should be restricted to the state where the property is localized or has a business situs, or if it has none, to the state of the owner's domicile. *Wheeling Steel Corporation v. Fox, supra.*

But an income tax is essentially a tax *in personam* and principles applicable to inheritance taxes and *ad valorem* property taxes should not be confusedly invoked.

New Jersey has no income tax but she certainly has power to enact one and to subject to her tax the income of a New York resident derived from property owned in New Jersey. Therefore, we discuss the situation in the instant case from that standpoint. Appellant is a resident of New York and derives her entire income from property located in New Jersey. Clearly, New Jersey protects her in her property and New York protects her in her person. If then, her net income exceeds the allowable personal exemptions (and New Jersey must not discriminate to favor residents) why should not each State exact a *quid pro quo* proportioned to her ability to pay? New York's tax does not affect, attach to, or become a lien upon her New Jersey property.

New York merely says, if you wish to enjoy the benefits of residence here, pay us a personal tax which will be computed upon your net income from all sources. If, through unfortunate investments made here or elsewhere, the losses offset the income from your New Jersey property, you need pay no tax; indeed

if you receive income from sources in New York and your New Jersey property becomes unprofitable, you may deduct those losses from your gross income here. New Jersey could impose an income tax, of course, only if the New Jersey property produced net income over and above expenses and charges incurred in producing it.

But appellant contends for the right to enjoy the benefits of New York residence and to be able to take to herself here and enjoy as she chooses, sizable annual net income and yet escape scot-free from the payment of any tax. Her contention, if upheld, would discriminate against and place at a disadvantage the great mass of her fellow-residents who, except the comparatively few similarly circumstanced, are required to contribute to the costs of our government.

We do not understand appellant's reference to possible multiple state taxation by which, we assume, is meant taxation by more than two States. Such a situation might arise where an individual conducted a business in three or more States, but that is not the case here. In any event, taxation by the domiciliary State of income from business activities carried on elsewhere has been upheld by this Court in *Lawrence v. State Tax Commission, supra.* And it would certainly seem that if a resident of New York must include in the measure of his income tax income from business done without the State, he should likewise be required to include income from property owned without the State.

A veritable paradox of reasoning is indulged in by appellant in seeking to distinguish the *Lawrence* case.

On page 19 of appellant's brief it is said that the decision there necessarily invoked "the *mobilia* maxim", but on page 24 appellant arrives at the interesting conclusion, after discussing *First National Bank v. Maine,* decided prior to the *Lawrence* case, that "the *mobilia* maxim has been thoroughly emasculated"!

We respectfully submit that *Lawrence v. State Tax Commission, supra,* rested upon very much broader ground than merely that Mississippi could tax the income because she could tax the obligation to pay for services rendered in Tennessee. This Court clearly said that taxation of income at the domicile of the recipient does not come within the purview of the rule that tangibles, which would include real estate, located outside of the domiciliary state are not subject to taxation within it, nor is it in any respect so arbitrary or unreasonable as to place it outside the domiciliary state's constitutional power of taxation.

In our view, *Lawrence v. State Tax Commission, supra,* is controlling here and appellant can succeed only if this Court concludes to overrule that decision. Appellant says (p. 19 of Brief) that the decision is not in harmony with *Senior v. Braden* and *Wheeling Steel Corp v. Fox.* It suffices to say that both those cases involved a property tax and not, as here, a personal income tax.

We believe that we have dealt with the nature and effect of the tax here involved sufficiently to demonstrate that it is neither arbitrary nor discriminatory and that rules of law applicable to inheritance and property taxes, said to bar so-called multiple taxation, should not be here applied.

We conclude this point with a suppositious situation intended graphically to portray the unreasonableness of the appellant's contentions. Let us assume that there are four residents of New York whom we designate A, B, C and D, each having the identical amount of X dollars of net income. A's income is derived entirely from rental of a factory building in Jersey City, B's from interest on a mortgage on the factory, C's from the business of operating the factory, and D's from rental of a factory building in New York City.

If appellant's contentions be upheld, A and B are relieved from payment of the New York income tax, while C and D must pay. The situation is aggravated if, as we believe, this Court will find little merit in appellant's view that the mortgages from which she received interest were invested with a business situs in New Jersey. Then only A would enjoy immunity from our income tax and we think that great difficulty would attend explaining to B, C and D why, on any fair, reasonable and common sense basis, they should be required to pay a tax from which A was entirely relieved.

III.

An income tax, measured by a resident's entire net income, including rent from real property located elsewhere, involves no infringement of the taxpayer's rights under the Constitution of the United States.

The keystone of appellant's contention here, as it was in the *Pierson* case, is the decision of this Court in

Pollock v. Farmers Loan & Trust Co., (1895), 157 U. S. 429, rehearing (1895) 158 U. S. 601. Upon this case rest the advisory opinions of *Opinion of the Justices*, 84 N. H. 559, 149 A. 321 and 220 Mass. 613, cited by appellant, and the decision in *Peo. ex rel. Pierson v. Lynch, supra.* We respectfully submit that these decisions, and appellant's contention here, rest upon the erroneous belief that the *Pollock* case held that a tax on the income from property was a tax upon the property itself, subject to every constitutional restraint and limitation attaching to a tax upon the land. We hope to convince this Court of the incorrectness of that view.

The late Chief Judge Pound, in an address before the New York State Bar Association, said:

> "I think that lawyers and judges too often fail to recognize that the decision consists in *what was done, not what is said by the court in doing it.* Every opinion is to be read with regard to the facts in the case *and the question actually decided.*" (Emphasis ours.)
>
> N. Y. Bar Assoc. Bulletin, Sept. 1929, p. 279.

And some years earlier Judge (Now Mr. Justice) Cardozo, in distinguishing the opinions of the Court of Appeals in two prior cases wrote in *People ex rel. Desiderio v. Connolley,* (1924), 238 N. Y. 326, at p. 331:

> "No doubt there was much said in each of these opinions to give support to this belief. If we separate, however, things said from those decided, the question, supposed to be foreclosed, is seen to be open."

In the various opinions in the *Pollock* case, occupying, as they do, 101 pages in 157 U. S. and 98 pages in

158 U. S., much was *said* by the Court, pro and con, but what was *actually decided,* so far as at all relevant here was that a Federal tax on the income of real property was a direct tax within the meaning of Art. I, section 2, clause 3, and Art. I, section 9, clause 4 of the Constitution of the United States and, hence, subject to the rule of apportionment among the states. The effect of the decision was, of course, obviated by the subsequent enactment of the Sixteenth Amendment. The *actual decision* in the *Pollock* case has *absolutely no bearing* upon the point at issue here.

There is no room whatever for doubt as to the holding in the *Pollock* case, as is evidenced by the words of Chief Justice Fuller, page 618 of 158 U. S.:

> "Our previous decision was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; *and the Court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct.*" (Emphasis ours.)

And in *Knowlton v. Moore,* (1900), 178 U. S. 41, this Court said, of its decision in the *Pollock* case, page 82:

> "*The constitutional meaning of the word direct was the matter decided.* Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule

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There is no room whatever for doubt as to the holding in the *Pollock* case, as is evidenced by the words of Chief Justice Fuller, page 618 of 158 U. S.:

> "Our previous decision was confined to the consideration of the validity of the tax on the income from real estate and on the income from municipal bonds. The question thus limited was whether such taxation was direct or not, in the meaning of the Constitution; *and the Court went no farther, as to the tax on the income from real estate, than to hold that it fell within the same class as the source whence the income was derived, that is, that a tax upon the realty and a tax upon the receipts therefrom were alike direct.*" (Emphasis ours.)

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> "*The constitutional meaning of the word direct was the matter decided.* Considering that the constitutional rule of apportionment had its origin in the purpose to prevent taxes on persons solely because of their general ownership of property from being levied by any other rule

than that of apportionment, two things were decided by the court: First, that no sound distinction existed between a tax levied on a person solely because of his general ownership of real property, and the same tax imposed solely because of his general ownership of personal property. Secondly, that the tax on the income derived from such property, real or personal, was *the legal equivalent of a direct tax on the property from which said income was derived,* and hence must be apportioned." (Emphasis ours.)

In *Flint v. Stone Tracy Co.,* (1911), 220 U. S. 108, the Court said, page 162:

"In the *Pollock* case, as we have seen, the tax was held unconstitutional, because it was *in effect* a direct tax on the property solely because of its ownership." (Emphasis ours.)

In *McCoach v. Minehill Railway Co.,* (1913), 228 U. S. 295, at page 301, this Court, analyzing its decision in the *Flint v. Stone Tracy* case said:

"In discussing the constitutional question, reference was first made to the case of Pollock v. Farmers Loan & Trust Co. • • • which held the income tax provisions of the Act of August 27, 1894 • • • to be unconstitutional because *amounting to* a direct tax within the meaning of the Constitution, and because not apportioned according to population as required by that instrument." (Emphasis ours.)

In *Stratton's Independence v. Howbert,* (1913), 231 U. S. 399, at page 414:

"This court had decided in the *Pollock Case* that the income tax law of 1894 *amounted in effect to a direct tax* upon property, and was invalid because not apportioned according to population as prescribed by the Constitution." (Emphasis ours.)

No one doubted the power of Congress to impose an income tax—the only question involved in the *Pollock* case was the mode of laying the tax. If it was held to be a direct tax, it was subject to the rule of apportionment among the States, whereas, if it was an excise, it was subject only to the rule of uniformity.

The constitutional limitations upon the manner of imposing a direct tax are said to have the purpose of preventing any State being called upon to contribute more than its due share of the burdens of the Federal government.

Cooley on Taxation, 4th Ed., Vol. 1, §110.

See also,

Meigs, The Growth of the Constitution, 2nd Ed., 1900, pp. 41-66, pp. 159-168;

Eliot, Debates in the Federal Convention, V. 302.

Clearly, Congress could not lay a direct property tax without apportioning it in accordance with the population of the several States, exactly as representatives are allotted among the several States. The practical effect is that when the representatives of any one State vote in the House upon a law imposing a direct property tax, they do so under the restraint that, according as they possess the political power to vote the tax, it falls upon the citizens of the State they represent. By the same token, the representatives of a group of States least affected by a proposed tax cannot combine to vote a tax, the burden of which would fall upon a few wealthier States. Thus, it was said in the *Pollock* case, p. 582 of 157 U. S.:

> "It is true that the effect of requiring direct taxes to be apportioned among the States in proportion to their population is necessarily that the amount of taxes on the individual taxpayer in a State having the taxable subject-matter to a larger extent in proportion to its population than another State has, would be less than in such other State, but this inequality must be held to have been contemplated, and was manifestly designed to operate to restrain the exercise of the power of direct taxation to extraordinary emergencies, and to prevent an attack upon accumulated property by mere force of numbers."

Finding that a tax upon the income from real estate would accomplish substantially the result which the rule of apportionment was designed to bar, the Court held the tax to be violative of the constitutional provisions requiring apportionment of direct taxes.

Brushaber v. Union Pac. R. R. Co., (1916) 240 U. S. 1, 16.

But the Court had no occasion to, and did not hold that a tax affecting the income from land was, in fact, a tax upon the land, subject to every constitutional restriction applicable to a land tax.

In other words, the Court considered the effect of the tax, not from the standpoint of the taxpayer, though he certainly was affected, but rather from the standpoint of the effect of the tax upon our dual system of government. For the same reason such cases as *Northwestern Mutual Life Ins. Co. v. Wisconsin*, (1927), 275 U. S. 136, *National Life Ins. Co. v. United States*, (1928), 277 U. S. 508, *Metcalf & Eddy v. Mitchell*, (1926), 269 U. S. 514, *Gillespie v. Oklahoma*,

(1922), 257 U. S. 501, and *Burnet v. Coronado Oil & Gas Co.*, (1932), 285 U. S. 393, cited by and relied on by appellant have no pertinence here. In those cases, the effect of the tax is considered, not from the standpoint of the taxpayer, but as affecting the proper functioning of the government through a tax upon its instrumentalities. No such question is here involved.

New York cannot tax New Jersey land because New York is utterly without jurisdiction over such a tax subject. But because New York imposes a tax upon one of her residents, which tax remotely and through a double indirection *may* operate so as, in some degree, to burden New Jersey land is no reason, in our view, to strike down the tax.

New York, we urge, has the constitutional and plenary authority and power to lay a tax upon persons domiciled within her borders and to measure such a tax by their net incomes from all sources. Thus, in *McCulloch v. Maryland,* (1819), 4 Wheat. 316, Mr. Chief Justice Marshall spoke of the vital necessity of the power of taxation to the very existence of government and said, p. 428:

> "The people of a State, therefore, give to their government a right of *taxing themselves and their property,* and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representatives, to guard them against its abuse." (Emphasis ours.)

We think the great Chief Justice chose his words deliberately when he spoke of the people "taxing them-

selves and their property", indicating that persons and property are separate and distinct tax objects. On page 429, the Chief Justice gives utterance to the fundamental principle that "all subjects over which the sovereign power of a State extends, are objects of taxation". It would seem necessarily to follow that appellant, domiciled in New York, constitutes, in her person, an object of taxation to which the taxing power of the State extends.

And, as recently as 1934, this Court in *Virginia v. Imperial Coal Co.*, 293 U. S. 15, 19, referred to the principle that domicile in a state establishes a basis for taxation.

The Courts of New York have held that a tax on rentals of real property is not a tax upon the property producing such rentals. A legislative Act passed May 13, 1846, made certain rentals from real estate taxable as personal property. In *Van Rensselaer v. Dennison*, (1850), 8 Barb. 23, the Court was called upon to decide whether a provision in a lease requiring the lessee to pay all taxes that might be assessed upon the "granted premises" or upon the lessor "for and in respect of said premises", made it obligatory upon the lessee to pay the tax imposed upon the rentals. The Court held that the tax on rentals was *not* a tax upon the "granted premises" nor upon the landlord "for and in respect of such premises".

The Court said, page 26:

> "Was this a tax 'for said premises,' and also 'in respect of said premises?' It must be both, to be within the covenant. I think it was neither. It

> was not a tax 'for said premises;' that would mean the same as a tax 'on said premises,' and I do not see how it can properly be said to be a tax 'in respect of' said premises, because it was on rents that issued out of said premises. The plaintiff was not taxed for and in respect of said premises, but for and in respect of the rents reserved thereon. The value of the premises had no influence in regulating the amount of the tax. The rent reserved might be a high one on a poor farm or a low one on a valuable farm. The farm was never appraised, nor its value estimated. The tax was laid without reference to the farm, and in no sense, 'in respect to the premises,' or their value. It was the income of a person which was taxed, at a uniform value, prescribed by the statute. *Suppose a general income tax should be laid, and the plaintiff in this case should be assessed for his whole income; could he collect a part of the tax from the defendant, under this covenant, because a portion of his income was rent of the defendant's farm? I think not; nor do I see how the cases would differ in principle. In both it would be a tax on the income alone.*'' (Emphasis ours.)

The opinion in the *Van Rensselaer* case is cited with approval in *Woodruff v. Oswego Starch Factory* (1903), 177 N. Y. 23, 30, in which case the Court of Appeals made the same ruling in a similar situation, affirming the Appellate Division (70 App. Div. 481) which latter Court, in the course of its opinion (p. 484) explained and distinguished the decisions in the *Pollock* case.

Certainly, land in New Jersey enjoys no greater immunity from taxation by New York than does land in Mexico from taxation by the United States. If a tax on income from rents of real property actually is a tax on the land, then it must inevitably follow that the

United States cannot subject to a Federal income tax, the income of a United States citizen derived from rents on land in Mexico. That exact situation came before this Court in 1923, in the case of *Cook v. Tait*, 265 U. S. 47. Counsel for the taxpayer cited the *Pollock* case in support of his contention that the Congress was without power to impose an income tax upon income derived solely from real and personal property permanently located within the territorial jurisdiction of the Republic of Mexico (p. 47). It further appeared that the taxpayer, though a citizen of the United States, was himself permanently resident and domiciled in the City of Mexico.

This Court, quite evidently, considered the decision in the *Pollock* case to have no application to the facts under consideration because no reference to that case is found in the opinion in the *Cook* case. The Court held that the Congress had the power to tax the income received by a citizen of the United States, who was himself domiciled abroad, derived from property located without the territorial jurisdiction of the United States.

We fully appreciate that it may be said that the taxing power of the United States differs from the taxing power of the States, and that the operation of the Fifth Amendment upon the powers of the Congress is not identical with the application of the Fourteenth Amendment to the powers of the States. But the conclusion, that this Court could not have ruled as it did in *Cook v. Tait, supra,* with respect to Federal taxation of income from Mexican lands if the *Pollock* case decided that a tax on rental income was a tax on the land pro-

ducing such income, is, we submit, unanswerable. (See also, *Cotterman v. United States* (1926), 62 Ct. Claims 415, certiorari denied 273 U. S. 732.)

We strongly urge that the *Pollock* case has no more bearing upon the issue involved here than it had upon the question concerned in *Cook v. Tait*. That case, as does the instant case, involved the question of *power to tax*. The *Pollock* case concerned the question of the constitutional *method of taxation*—whether or not the rule of apportionment among the States applied—and not the question of power to tax because no one disputed the power of Congress to lay a direct tax on incomes, provided the tax was apportioned according to the population of the various States.

Appellant leans heavily upon the decision of this Court in *Senior v. Braden* (1935), 295 U. S. 422; as we think, misapprehending the effect of that decision. The facts there dealt with an Ohio tax on investments and other intangible property of persons residing within the State of Ohio. The term "investment" was defined to include incorporeal rights of a pecuniary nature, from which income is or may be derived, including equitable interests in land and rents. A tax was imposed *upon such investments*, measured by the income yield therefrom. The taxpayer was the owner of several transferable certificates showing him to be the beneficiary under certain declarations of trust and entitled to stated portions of rent derived from specified parcels of land, some within and some outside of Ohio. The question *actually decided* by the Court was that the property of the taxpayer, represented by the ownership of his certificates, was an interest in the

land, and it was conceded that the tax was unconstitutional, if such was found to be the fact. The decision has no bearing, as a precedent, upon the question before this Court in the instant case. While purely *obiter dicta,* it is extremely interesting to note that Justices Stone, Brandeis and Cardozo entertain no doubt "that a State may tax the income of its citizen derived from land in another State" (page 436).

We respectfully submit that the restriction against the taxation by a State of real property located beyond the borders of the taxing State, has no application to the taxation by a State of one of its residents, with respect to income from real property located in another jurisdiction where the taxation reaches such income, as part of a general integrated system of income taxation, after the deduction of any and all expenses incurred in the production of such income, and where the particular item of income has lost its identity by becoming intermingled with and part of the resident's entire net income from all sources.

IV.

The State may include in the measure of a resident's income tax, interest derived from debts, evidenced by bonds of non-residents and secured by mortgages on real estate located in another State; and this, though the bond and mortgage be held or deposited in such other State.

The point just made seems so well settled as to require little in the way of argument or citation of authority. One of the leading cases is *Kirtland v. Hotch-*

kiss (1879), 100 U. S. 491, which is frequently cited with approval in later cases. This Court there said, page 498:

> "Plainly, therefore, our only duty is to inquire whether the Constitution prohibits a State from taxing, in the hands of one of its resident citizens, a debt held by him upon a resident of another State, and evidenced by the bond of the debtor, secured by deed of trust or mortgage upon real estate situated in the State in which the debtor resides.
>
> "The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the State imposing the tax. The debt is property in his hands constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow-citizens of the same State, to contribute for the support of the government whose protection he enjoys.
>
> "That debt, although a species of intangible property, may, for purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. Nor is the debt, for the purposes of taxation, affected by the fact that it is secured by mortgage upon real estate situated in Illinois. * * * The debt, then, having its *situs* at the creditor's residence, both he and it are, for the purposes of taxation, within the jurisdiction of the State. It is, consequently, for the State to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government."

Without any question, appellant is the legal owner of an interest in the mortgages here in question, which

interest is intangible personal property, and has its *situs* in this State. It is true that an exception is made to the rule that intangibles take the domicile of their owner, in the case of intangibles having a business *situs* in another State. Appellant urges that that exception be applied here and cites cases in which the exception has been invoked.

New Orleans v. Stempel (1899), 175 U. S. 309;
Bristol v. Washington Co. (1900), 177 U. S. 133, 141;
State Board of Assessors v. Comptoire, etc. (1903), 191 U. S. 388;
Metropolitan Life Insurance Co. v. New Orleans (1907), 205 U. S. 395;
Liverpool & L. & G. Ins. Co. v. Board of Assessors (1911), 221 U. S. 346;

Those cases are of doubtful pertinence here since they involved taxation of non-residents and not, as here, the taxation of the income of a resident. Moreover, in all those cases, there was evidence showing that the intangibles there in question had been used as part of a business conducted in the foreign state.

Thus, in *Beidler v. So. Carolina* (1930), 282 U. S. 1, this Court said, page 8:

> "But a conclusion that debts have thus acquired a business *situs* must have evidence to support it * * *."

Such evidence is completely lacking here; in fact, it plainly appears that the mortgages in question were held simply as investments and formed no part of any business conducted in New Jersey. We have already taken exception to appellant's statement (p. 4 of Brief)

to the effect that David Cohn and Maurice Cohn "acted as the agents of the appellant" in managing the property which gave rise to appellant's income. In a futile effort to import a business *situs* in New Jersey to the bonds and mortgages from which appellant derived income in the form of interest, appellant reiterates (p. 20 of Brief) the totally unwarranted statement that "all of her property [was] managed by her agents there [New Jersey]."

Of course, appellant's co-executors were not her agents and there was no business conducted in New Jersey. Nor is there anything in the record anywhere from which there can be spelled out anything in the way of transactions or activities even approaching the conduct of a business. All that appears from the record is that the estate of Marcus Cohn deceased has always been administered in New Jersey by the three executors, one of whom was appellant (R. 13) and that the mortgages were on New Jersey property and were physically held and deposited in New Jersey (R. 14-15). In such circumstances, no business *situs* in New Jersey can be said to exist.

In *People ex rel. Booth v. Gilchrist* (1925), 212 App. Div. 763, it was held that the mere investment and conservation of an estate did not constitute the carrying on of any trade or business.

The question whether bonds and mortgages owned by a resident of Connecticut had a business *situs* in New York, because the mortgages were liens on New York real estate and were physically held in New York by the owner's agent who had authority to invest and

reinvest at his discretion, came before the Supreme Court of Errors of Connecticut in *Manufacturer's Trust Co. v. Hackett* (1934), 118 Conn. 101, 170 Atl. 792. It is at once apparent that the facts in that case, upon which it was contended that a business *situs* in New York existed, were very much stronger than in the instant case. Nevertheless, the high court of Connecticut concluded that the bonds and mortgages had no business *situs* in New York, saying:

> "This situation when viewed as a whole cannot fairly be regarded as constituting the engaging or employing of capital in business by the decedent through her agent in any sense which reason and the precedents, when broadly considered, indicate as being that contemplated in order to constitute business *situs*. Activities and operations of a business nature were limited to the management, investment, and reinvestment of the decedent's private estate, differing in no respect from what she could and naturally might have done for herself but for disqualifications of age and inexperience. They savor not at all of the loaning of money to the public as a business or other operations for profit which the nature and logical justification for the doctrine connote and which, as we have noted, has usually characterized situations recognized as conferring a business *situs*. Under such circumstances, at least, authority in an agent to invest and reinvest principal as well as collect and remit to the owner does not, as indicated *obiter* in Lockwood v. Blodgett, constitute such an engaging in business as to create this *situs*."

It is respectfully submitted that there can be not the slightest doubt that the income of appellant received from these New Jersey mortgages was properly subjected to a New York income tax.

V.

Conclusion.

We respectfully submit that our income tax is so strikingly different in its operation and effect from a succession tax or a property tax that the tax, as here imposed, should be upheld despite the fact that, by the inclusion of appellant's entire income, both the State of domicile and the State having *situs* of the property *may* reach the same income by a tax, *sui generis* as to kind, but having mostly the character of an excise.

The tax is general and non-discriminatory and, to sustain appellant's contention, would place her at an unfair advantage over many of her fellow-residents. It would seem, further, that a reversal of the judgment of the New York Court of Appeals in this case would require overruling, or at least casting serious doubt upon, the decision of this Court in *Lawrence v. State Tax Commission, supra.*

Sustaining the tax would not result in countenancing an onerous or arbitrary tax, since it is carefully proportioned to appellant's ability to pay and reaches the income from New Jersey property only when and if her entire net income from all sources exceeds her statutory personal exemption. Further, though we do not urge it as validating the tax if otherwise bad, reciprocal statutory credits enacted by New York and New Jersey would undoubtedly reduce or entirely eliminate a New Jersey tax.

"Logic and taxation are not always the best of friends," observed Mr. Justice McReynolds in *Sonne-*

born Bros. v. Cureton (1922), 262 U. S. 506, 522. The instant case, however, presents a situation in which logic and taxation walk hand in hand. The most scientific and logical form of taxation rests upon as broad a base as possible and is proportioned to the ability of the taxpayer to pay for definite benefits bestowed upon him, in his person or his property, by the taxing power.

We respectfully contend that the New York Personal Income Tax fully meets these tests and, so far as its broad application is concerned, is limited only by constitutional inability to burden Federal functions or to diminish salaries of officers constitutionally protected against diminution of compensation. Further limitations, as here contended for by appellant, would seriously interfere with the desirable aim of spreading the costs of government over as large a base as possible, especially in view of implications affecting taxation of the income of a resident from tangible personal property and business activities outside the State.

It is respectfully submitted that the final order and judgment of the Supreme Court of the State of New York should be affirmed.

Respectfully submitted,

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APPENDIX A.

NEW YORK STATE PERSONAL INCOME TAX LAW Being Article 16 of the New York Tax Law (Ch. 60 of the Consolidated Laws), as added by Ch. 627, Laws of 1919, in effect May 14, 1919, and as amending Ch. 62, Laws of 1909, giving effect to amendments to the close of the legislative session of 1935.

ARTICLE 16*

Taxes Upon and With Respect to Personal Incomes

Section 350. Definitions.
351. Imposition of income tax.
351–a. Reimposition of tax against nonresidents.
351–c. Temporary increase of personal income tax.
351-d. Emergency tax on personal incomes; temporary. (1933).
351–e. Temporary emergency tax on personal net incomes. (1934).
351–f. Emergency tax on personal incomes. (1935).
352. Tax a debt.
353. Ascertainment of gain and loss.
354. Exchange of property.
355. Exchange of property when no gain or loss is realized.
356. Inventory.
357. Net income defined.
358. Computation of net income.

* Note: Sections 351-b, 351-c, 351-d, 351-e and 351-f, dealing with temporary emergency increases, have been omitted.

358-a. Installment basis.
359. Gross income defined.
360. Deductions.
361. Items not deductible.
362. Exemptions.
363. Credit for taxes in case of taxpayers other than residents of the state.
364. Partnerships.
365. Estates and trusts.
366. Information and payment at source.
367. Taxpayers' returns.
367–a. Returns in cases of changed residence.
368. Partnership returns.
369. Fiduciary returns.
370. Returns when accounting period changed.
371. Time and place of filing returns.
372. Administration of income tax law.
373. Powers of tax commissions.
373–a. Oaths and acknowledgments.
374. Revision and readjustment of accounts by tax commission.
375. Review of determination of tax commission by certiorari and regulations as to writ.
376. Penalties, additional taxes and interest.
377. When payable.
379. Collection of taxes; penalties and interest.
380. Warrant for the collection of taxes.
381. Action for recovery of taxes.
382. Distribution of the income tax.

383. Tax commission to make regulations and to collect facts.
384. Secrecy required of officials; penalty for violation.
385. Contract to assume income tax illegal.

§*350. Definitions.* For the purpose of this article and unless otherwise required by the context:

1. The word "comptroller" means the state comptroller.

2. The word "taxpayer" includes any person, trust or estate subject to a tax imposed by this article, or whose income is in whole or in part subject to a tax imposed by this article, and does not include corporations.

3. The words "military or naval forces of the United States" include the marine corps, the coast guard, the army nurse corps, female, and the navy nurse corps, female, but this shall not be deemed to exclude other units otherwise included within such words.

4. The words "taxable year" mean the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this article. The words "fiscal year" mean an accounting period of twelve months, ending on the last day of any month other than December.

5. The word "fiduciary" means a guardian, trustee, executor, administrator, receiver, conservator, or any person, whether individual or corporate, act-

ing in any fiduciary capacity for any person, trust or estate.

6. The word "paid" for the purposes of the deductions and credits under this article, means "paid or accrued" or "paid or incurred," and the terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed, under this article. The term "received" for the purpose of the computation of net income under this article means "received or accrued" and the term "received or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed under this article.

7. The word "resident" applies only to natural persons and includes any person domiciled in the state, except a person who, though domiciled in the state, maintains no permanent place of abode within the state, but does maintain a permanent place of abode without the state, and who spends in the aggregate not to exceed thirty days of the taxable year within the state. In addition, it includes any person who maintains a permanent place of abode within the state and spends in the aggregate more than seven months of the taxable year within the state, whether or not domiciled in the state during any portion of said period, and such a person shall be taxed the same as though he had been domiciled in the state during the entire taxable year. A resident estate or trust includes an estate or trust created by or consisting of property of a person domiciled within the state or an estate of a deceased person who at the time of death was domiciled within the state.

8. The word "dividend" means any distribution made by a corporation out of its earnings or profits to its shareholders or members, whether in cash or in other property or in stock of the corporation, other than stock dividends as herein defined. "Stock-dividends" means new stock issued, for surplus or profits capitalized, to shareholders in proportion to their previous holdings.

9. The words "foreign country" or "foreign government" mean any jurisdiction other than one embraced within the United States. The words "United States" include the states, the territories of Alaska and Hawaii and the District of Columbia.

10. The words "withholding agent" include all individuals, corporations, associations and partnerships, in whatever capacity acting, including lessees, or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the state, or of any municipal corporation or political subdivision of the state, having the control, receipt, custody, disposal or payment, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits and income taxable under this article.

11. The word "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization; through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this chapter, a trust or estate or a corporation; and the word "partner" in-

cludes a member in such a syndicate, group, pool, joint venture, or organization.

§351. *Imposition of income tax.* A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: Two per centum of the amount of net income not exceeding one thousand dollars; three per centum of the amount of net income in excess of one thousand dollars but not in excess of three thousand dollars; four per centum of the amount of net income in excess of three thousand dollars but not in excess of five thousand dollars; five per centum of the amount of net income in excess of five thousand dollars but not in excess of seven thousand dollars; six per centum of the amount of net income in excess of seven thousand dollars but not in excess of nine thousand dollars; seven per centum of the amount of net income in excess of nine thousand dollars; provided however, that the tax payable in any case where a return is required to be filed as a basis for taxation under this article shall not be less than two per centum of the net income computed as required by the several provisions of this article, except (a) that there shall be excluded from gross income gains and profits derived from any sale or exchange of real or personal property not connected with any trade or business carried on for gain or profit, and (b) there shall not be deducted losses sustained as the result of any sale or exchange of real or personal property not connected with any trade or business carried on for gain or profit; but, in computing such minimum tax, the personal and dependency exemptions specified in section three hundred sixty-two

8. The word "dividend" means any distribution made by a corporation out of its earnings or profits to its shareholders or members, whether in cash or in other property or in stock of the corporation, other than stock dividends as herein defined. "Stock-dividends" means new stock issued, for surplus or profits capitalized, to shareholders in proportion to their previous holdings.

9. The words "foreign country" or "foreign government" mean any jurisdiction other than one embraced within the United States. The words "United States" include the states, the territories of Alaska and Hawaii and the District of Columbia.

10. The words "withholding agent" include all individuals, corporations, associations and partnerships, in whatever capacity acting, including lessees, or mortgagors of real or personal property, fiduciaries, employers, and all officers and employees of the state, or of any municipal corporation or political subdivision of the state, having the control, receipt, custody, disposal or payment, of interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable annual or periodical gains, profits and income taxable under this article.

11. The word "partnership" includes a syndicate, group, pool, joint venture, or other unincorporated organization, through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this chapter, a trust or estate or a corporation; and the word "partner" in-

cludes a member in such a syndicate, group, pool, joint venture, or organization.

§351. *Imposition of income tax.* A tax is hereby imposed upon every resident of the state, which tax shall be levied, collected and paid annually upon and with respect to his entire net income as herein defined at rates as follows: Two per centum of the amount of net income not exceeding one thousand dollars; three per centum of the amount of net income in excess of one thousand dollars but not in excess of three thousand dollars; four per centum of the amount of net income in excess of three thousand dollars but not in excess of five thousand dollars; five per centum of the amount of net income in excess of five thousand dollars but not in excess of seven thousand dollars; six per centum of the amount of net income in excess of seven thousand dollars but not in excess of nine thousand dollars; seven per centum of the amount of net income in excess of nine thousand dollars; provided however, that the tax payable in any case where a return is required to be filed as a basis for taxation under this article shall not be less than two per centum of the net income computed as required by the several provisions of this article, except (a) that there shall be excluded from gross income gains and profits derived from any sale or exchange of real or personal property not connected with any trade or business carried on for gain or profit, and (b) there shall not be deducted losses sustained as the result of any sale or exchange of real or personal property not connected with any trade or business carried on for gain or profit; but, in computing such minimum tax, the personal and dependency exemptions specified in section three hundred sixty-two

of this chapter shall be allowed in full. A like tax is hereby imposed and shall be levied, collected and paid annually, at the rates specified in this section, upon and with respect to the entire net income as herein defined, except as hereinafter provided, from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state.

§*351-a. Reimposition of tax against nonresidents.* The tax provided for in section three hundred and fifty-one of this chapter, upon and with respect to income derived from all property owned and from every business, trade, profession or occupation carried on in this state by natural persons not residents of the state, is hereby reimposed with respect to the taxable income for the calendar year nineteen hundred and nineteen and for any taxable year ending during the year nineteen hundred and nineteen, and for each year thereafter. Such tax shall be levied, collected and paid for the year nineteen hundred and nineteen, and returns with respect thereto shall be filed on or before June thirtieth, nineteen hundred and twenty, unless the time shall be extended as provided in this article.

§*352. Tax a debt.* Every tax imposed by this article, and all increases, interest and penalties thereon, in addition to being a tax against property, business, trade, profession or occupation, as in this article provided shall also become, from the time it is due and payable, a personal debt, from the person or persons liable to pay the same, to the state of New York.

[Renumbered by ch. 795, L. 1921. Former sec. 352 repealed by ch. 897, L. 1923, in effect June 1, 1923.]

§353. *Ascertainment of gain and loss.* 1. For the purpose of ascertaining the gain derived or loss sustained from the sale or other disposition of property, real, personal or mixed, the basis shall be, in case of property acquired on or after January first, nineteen hundred and nineteen, the cost thereof, or the inventory value if the inventory is made in accordance with this article.

2. In case of property acquired prior to January first, nineteen hundred and nineteen, and disposed of thereafter.

(a) No profit shall be deemed to have been derived if either the cost or the fair market price or value on January first, nineteen hundred and nineteen, exceeds the value realized.

(b) No loss shall be deemed to have been sustained if either the cost or the fair market price or value on January first, nineteen hundred and nineteen, is less than the value realized.

(c) Where both the cost and the fair market price or value on January first, nineteen hundred and nineteen, are less than the value realized, the basis for computing profit shall be the cost or the fair market price or value on January first, nineteen hundred and nineteen, whichever is higher.

(d) Where both the cost and the fair market price or value on January first, nineteen hundred and nineteen, are in excess of the value realized, the basis for computing loss shall be the cost or the fair market

price or value on January first, nineteen hundred and nineteen, whichever is lower.

3. In the case of property acquired by gift after December thirty-first, nineteen hundred twenty-seven, the basis shall be the same as it would be in the hands of the donor or the last preceding owner by whom it was not acquired by gift, except that for the purpose of determining loss the basis shall be the basis so determined on the fair market value of the property at the time of the gift, whichever is lower. If the facts necessary to determine the basis in the hands of the donor or the last preceding owner are unknown to the donee, the tax commission shall, if possible, obtain such facts from such donor or last preceding owner, or any other person cognizant thereof. If the tax commission finds it impossible to obtain such facts, the basis in the hands of such donor or last preceding owner shall be the fair market value of such property as found by the tax commission as of the date or approximate date at which, according to the best information that the tax commission is able to obtain, such property was acquired by such donor or last preceding owner.

4. In the case of property acquired by gift or transfer in trust on or before December thirty-first, nineteen hundred twenty-seven, gain or loss shall be determined as provided in subdivision one or two of this section, except that the word "cost" as used in said subdivisions shall be deemed to mean the fair market price or value of such property at the time of such acquisition. The provisions of this subdivision shall apply to the acquisition of property interests through the exercise of a power of appointment regardless of the time of acquisition.

5. If the property was acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition. In the case of property transferred in trust to pay the income for life to or upon the order or direction of the grantor, with the right reserved to the grantor at all times prior to his death to revoke the trust, the basis in the hands of the persons entitled under the terms of the trust instrument to the property after the grantor's death shall, after such death, be the same as if the trust instrument had been a will executed on the day of the grantor's death. For the purpose of this subdivision, property passing without full and adequate consideration under a general power of appointment exercised by will, shall be deemed to be property passing from the individual exercising such power by bequest or devise. In case such property has been appraised (a) pursuant to article ten, ten-a or ten-c of this chapter, or (b) for death tax purposes by the state or domicile of the transferor, or (c) for the purpose of the United States estate tax, the appraised value shall be presumed to be the fair market value at the date as of which the appraisal was made, but if appraised as of the same date for more than one of such purposes, the appraisal for the purpose first specified shall be presumed to be the fair market value.

6. In the case of property acquired by a partnership, if the basis is not otherwise determined under any of the subdivisions one to five, inclusive, of this section, the basis shall be the same as it would be in the hands of the transferor. If property so acquired by a partnership was distributed in kind to any partner, the

basis in the hands of such partner shall be such part of the basis in his hands of his partnership interest as is properly allocable to such property.

§354. *Exchange of property.* Upon the sale or exchange of property the entire amount of the gain or loss, determined under section three hundred and fifty-three of this article, shall be recognized, except as hereinafter provided in this section.

(1) No gain or loss shall be recognized if property held for productive use in trade or business or for investment (not including stock in trade or other property held primarily for sale, nor stocks, bonds, notes, choses in action, certificates of trust or beneficial interest, or other securities or evidences of indebtedness or interest) is exchanged solely for property of a like kind to be held either for productive use in trade or business or for investment, or if common stock in a corporation, is exchanged solely for common stock in the same corporation, or if preferred stock in a corporation is exchanged solely for preferred stock in the same corporation.

(2) No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

(3) No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock or securities in such cor-

poration, and immediately after the exchange such person or persons are in control of the corporation; but if the property thus transferred (other than stock in trade) is sold or otherwise disposed of by the corporation within the six months subsequent to such transfer, gain or loss to such person or persons shall be recognized as of the date of the exchange, the stock or securities received by such person or persons from the corporation being presumed in the absence of proof to the contrary in such case to be of the same value as the amount of the consideration received by the corporation on the subsequent sale or other disposition of such property; and it is further provided that in the case of an exchange by two or more persons this subdivision shall apply only if the amount of the stock and securities received by each is substantially in proportion to his interest in the property prior to the exchange.

(4) If property (as a result of its destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation, or the threat or imminence thereof) is compulsorily or involuntarily converted into property similar or related in service or use to the property so converted, or into money which is forthwith in good faith, under regulations prescribed by the tax commission, expended in the acquisition of other property similar or related in service or use to the property so converted, or in the acquisition of control of a corporation owning such other property, or in the establishment of a replacement fund, no gain or loss shall be recognized. If any part of the money is not so expended, the gain, if any, shall

be so recognized, but in an amount not in excess of the money which is not so expended.

(5) If there is distributed, in pursuance of a plan of reorganization, to a shareholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

(6) If an exchange would be within the provisions of subdivision (1), (2), or (3) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such subdivision to be received without the recognition of gain, but also of other property or money, then the gain, if any, to the recipient shall be recognized, but in an amount not in excess of the sum of such money and the fair market value of such other property.

(7) If an exchange would be within the provisions of subdivision (1), (2), or (3) of this section if it were not for the fact that the property received in exchange consists not only of property permitted by such subdivision to be received without the recognition of gain or loss, but also of other property or money, then no loss from the exchange shall be recognized.

(8) As used in this section—

The term "reorganization" means (A) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at

least a majority of the total number of shares of all other classes of stock of another corporation or substantially all the properties of another corporation), or (B) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (C) a recapitalization, or (D) a mere change in identity, form, or place of organization, however effected.

The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

As used in this section the term "control" means the ownership of at least eighty percentum of the voting stock and at least eighty percentum of the total number of shares of all other classes of stock of the corporation.

§355. *Exchange of property when no gain or loss is realized.* When property is exchanged for other property and no gain or loss is realized under the provisions of section three hundred and fifty-four, the property received shall be treated as taking the place of the property exchanged therefor.

§356. *Inventory.* Whenever in the opinion of the tax commission the use of inventories is necessary in

order clearly to determine the income of any taxpayer, inventories shall be taken by such taxpayer upon such basis as the tax commission may prescribe, conforming as nearly as may be to the best accounting practice in the trade or business and most clearly reflecting the income.

§357. *Net income defined.* The term "net income" means the gross income of a taxpayer less the deductions allowed by this article.

§358. *Computation of net income.* 1. The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year as the case may be); but if the taxpayer's annual accounting period is other than a fiscal year as defined in this article, or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year. Such net income shall be computed in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made upon such basis and in such manner as in the opinion of the tax commissioner does clearly reflect the income. In the case of the death of a taxpayer there shall be included in computing net income for the taxable period in which falls the date of his death, amounts accrued up to the date of his death if not otherwise properly includible in respect of such period or a prior period, and there shall be allowed for the same period amounts deductible under section three hundred and sixty of this chapter accrued up to the

date of his death if not otherwise properly allowable in respect of such period or a prior period.

2. If a taxpayer changes his accounting period from fiscal year to calendar year, from calendar year to fiscal year, or from one fiscal year to another, the net income shall, with the approval of the tax commission, be computed on the basis of such new accounting period, subject to the provisions of section three hundred and seventy.

§358-a. *Installment basis.* 1. A taxpayer who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the total profit realized or to be realized when the payment is completed, bears to the total contract price. In the case (1) of a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year), for a price exceeding one thousand dollars, or (2) of a sale or other disposition of real property, if in either case the initial payments do not exceed thirty per centum of the selling price (or, in case the sale or other disposition was in a taxable year beginning prior to January first, nineteen hundred thirty-five, the percentage of the selling price prescribed in the law applicable to such year), the income may be returned on the basis and in the manner above prescribed in this subdivision. As used in this subdivision the term "initial payments" means the payments receeived in cash or property other than evidences of

indebtedness of the purchaser during the taxable period in which the sale or other disposition is made, plus all payments made up to and at the time of transfer of title, provided that both the sale, or other disposition, and the transfer of title occurred in the same taxable period. The term "initial payments" shall not include evidences of indebtedness of the purchaser or amounts secured by the property sold or otherwise disposed of.

2. If a taxpayer entitled to the benefits of subdivision one of this section who has made returns on an accrual basis elects for any taxable year to report his net income on the installment basis, then in computing his income for the year of change or any subsequent year, amounts actually received during any such year on account of sales or other dispositions of property made in any prior year shall not be excluded.

3. If an installment obligation is satisfied at other than its face value or distributed, transmitted, sold, or otherwise disposed of, gain or loss shall result to the extent of the difference between the basis of the obligation and (1) in the case of satisfaction at other than face value or a sale or exchange—the amount realized, or (2) in case of a distribution, transmission, or disposition otherwise than by sale or exchange—the fair market value of the obligation at the time of such distribution, transmission, or disposition. Any gain or loss so resulting shall be considered as resulting from the sale or exchange of the property in respect of which the installment obligation was received. The basis of the obligation shall be the excess of the face value of the obligation over an amount equal to the income which would be returnable were the obligation satisfied

in full. This subdivision shall not apply to the transmission at death of installment obligations if there is filed with the tax commission, at such time as it may by regulation prescribe, a bond in such amount and with such sureties as it may deem necessary, conditioned upon the return as income, by the person receiving any payment on such obligations, of the same proportion of such payment as would be returnable as income by the decedent if he had lived and had received such payment.

§359. *Gross income defined.* The term "gross income":

1. Includes gains, profits and income derived from salaries, wages or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, *and whether situated within or without the state,* growing out of the ownership or use of or interest in such property; also from interest, rent, *(including rent derived from real property situated outside the state),* dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, including gains or profits or income derived through estates or trusts by the beneficiaries thereof, whether as distributed or as distributable shares, *it being intended to include all of the foregoing items, without regard to the source thereof, location of the property involved, or any other factor, except only a case where the inclusion thereof would be violative of constitutional restrictions.* The amount of all such items shall be included in the gross income for the taxable year in which

received by the taxpayer, unless, under the methods of accounting permitted in this article, any such amounts are to be properly accounted for as of a different period; but

[Subd. 1 amended by L. 1935, ch. 933, § 1, in effect May 16, 1935. Matter in italics new. Section 2 of the 1935 act provides: "§2. This act shall be retroactive to January first, nineteen hundred nineteen."]

2. Does not include the following items which shall be exempt from taxation under this article:

a. Amounts received under a life insurance contract paid by reason of the death of the insured, whether in a single sum or otherwise, (but if such amounts are held by the insurer under an agreement to pay interest thereon, the interest payments shall be included in gross income),

b. Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to three per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this article in respect of such annuity equals the ag-

gregate premiums or consideration paid for such annuity. In the case of a transfer for a valuable consideration, by assignment or otherwise, of a life insurance, endowment, or annuity contract, or any interest therein, only the actual value of such consideration and the amount of the premiums and other sums subsequently paid by the transferee shall be exempt from taxation under this section.

c. The value of property acquired by gift, bequest, devise or descent (but the income from such property shall be included in gross income).

d. Interest upon the obligations of the United States or its possessions; or securities issued under the provisions of the federal farm loan act of July seventeen, nineteen hundred and sixteen; or bonds issued by the war finance corporation; or the obligations of the state of New York or of any municipal corporation or political subdivision thereof; or investments upon which the tax provided for in section three hundred and thirty-one of this chapter has heretofore been paid since June first, nineteen hundred and seventeen, during the period of years for which such tax shall have been paid.

e. Any amount received through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness, or through the war risk insurance act or any law for the benefit or relief of injured or disabled members of the military or naval forces of the United States.

n. The rental value of a dwelling house and appurtenances thereof furnished to a minister of the gospel as part of his compensation and occupied by him or his immediate family.

o. Income received during the taxable year as interest from the savings and loan bank of the state of New York upon bonds issued by it pursuant to the provisions of the banking law.

p. Salaries of judges and justices of any court in this state, and of official referees appointed pursuant to law, for any taxable year beginning prior to January first, nineteen hundred thirty-three.

3. In the case of taxpayers other than residents, gross income includes only the gross income from sources within the state, but shall not include annuities, interest on bank deposits, interest on bonds, notes or other interest bearing obligations or dividends from corporations, except to the extent to which the same shall be a part of income from any business, trade, profession or occupation carried on in this state subject to taxation under this article.

§360. *Deductions.* In computing net income there shall be allowed as deductions:

1. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, or in the production of income required to be included in gross income under this article, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and including rentals or other payments re-

quired to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity.

2. All interest paid or accrued during the taxable year on indebtedness.

3. Taxes, other than estate, inheritance, legacy, succession, gift and income taxes, paid or accrued within the taxable year imposed, first, by the authority of the United States, or of any of its possessions, or, second, by the authority of any state, or territory, or any county, school district, municipality, or other taxing subdivision of any state or territory, not including those assessed against local benefits of a kind tending to increase the value of the property assessed, or, third, by the authority of any foreign government.

4. Losses sustained during the taxable year, and not compensated for by insurance or otherwise, if incurred in trade or business. The basis for determining the amount of the deduction under this subdivision or under subdivisions five and six of this section shall be the same as is provided in section three hundred and fifty-three of this chapter for determining the gain or loss from the sale or other disposition of property.

5. Losses sustained during the taxable year, and not compensated for by insurance or otherwise, if incurred in any transaction entered into for profit, though not connected with the taxpayer's trade or business; but in the case of a taxpayer other than a resident of the state, only as to such transactions in real property or

in tangible personal property having an actual situs within the state. Losses from wagering transactions shall be allowed only to the extent of the gains from such transactions.

6. Losses sustained during the taxable year of property not connected with the trade or business (but, in case of a taxpayer other than a resident, only of real property or tangible personal property having an actual situs within the state) if arising from fires, storms, shipwrecks, or other casualty or from theft, and not compensated for by insurance or otherwise.

7. Debts ascertained to be worthless and charged off within the taxable year. In the case of a debt existing on January first, nineteen hundred and nineteen, no more than its fair market value on that date shall be deducted. A worthless debt arising since January first, nineteen hundred and nineteen, from unpaid wages, salary, rent, or any similar item of taxable income, is not an allowable deduction, unless the income which such item represents has been included as income by the taxpayer in a return rendered under this article.

8. A reasonable allowance for the exhaustion, wear and tear of property, the income from which is required to be included in gross income under this article, used in the trade or business, including a reasonable allowance for obsolescence. In case of property held by one person for life with remainder to another person, the deduction shall be computed as if the life tenant were the absolute owner of the property and shall be allowed to the life tenant. In the case of property

held in trust the allowable deduction shall be apportioned between the income beneficiaries and the trustee in accordance with the pertinent provisions of the instrument creating the trust, or, in the absence of such provisions, on the basis of the trust income allocable to each.

9. In the case of mines, other natural deposits, except oil and gas wells, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case, based upon cost including cost of development not otherwise deducted; provided, that in the case of such properties acquired prior to January first, nineteen hundred and nineteen, the fair market value of the property (or the taxpayer's interest therein) on that date shall be taken in lieu of cost up to that date; provided, further, that in the case of mines discovered by the taxpayer on or after January first, nineteen hundred and nineteen, and not acquired as the result of a purchase of a proven tract or lease, where the fair market value of the property is materially disproportionate to the cost, the depletion allowance shall be based upon the fair market value of the property at the date of the discovery or within thirty days thereafter; but such depletion allowance based on discovery value shall not exceed fifty percentum of the net income of the taxpayer (computed without allowance for depletion) from the property upon which the discovery was made, except that in no case shall the depletion allowance be less than it would be if computed without reference to discovery value.

Discoveries shall include minerals in commercial quantities contained within a vein or deposit discover-

ed in an existing mine or mining tract by the taxpayer after January first, nineteen hundred and nineteen, if the vein or deposit thus discovered was not merely the uninterrupted extension of a continuing commercial vein or deposit already known to exist, and if the discovered minerals are of sufficient value and quantity that they could be separately mined and marketed at a profit.

In the case of oil and gas wells the allowance for depletion shall be twenty-seven and one-half per centum of the gross income from the property during the taxable year. Such allowance shall not exceed fifty per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph.

Such reasonable allowance in all the above cases to be made under rules and regulations to be prescribed by the tax commission. In the case of leases the deductions allowed by this subdivision shall be equitably apportioned between the lessor and lessee.

10. Contributions or gifts made within the taxable year to or for the use of:

(a) The United States, any state, territory or any political subdivision thereof, or the District of Columbia for exclusively public purposes:

(b) Any corporation, or trust, or community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to

children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, or to the special fund for vocational rehabilitation authorized by section twelve of the act of congress known as the world war veterans' act of nineteen hundred twenty-four;

(c) Posts or organizations of war veterans, or auxiliary units or societies of any such posts or organizations, if such posts, organizations, units, or societies are organized in the United States or any of its possessions, and if no part of their net earnings inures to the benefit of any private shareholder or individual; or

(d) A fraternal society, order, or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals; to an amount which in all the above cases combined shall not in the aggregate exceed fifteen per centum of the taxpayer's net income as computed without the benefit of this subdivision. Such contributions or gifts shall be allowable as deductions only if verified under rules and regulations prescribed by the tax commission.

In the case of a taxpayer other than a resident of the state the deductions under this subdivision shall be allowed only as to contributions or gifts made to corporations or associations incorporated by or organized un-

der the laws of this state or to the vocational rehabilitation fund above mentioned or to this state or any political subdivision thereof for exclusively public purposes.

11. In the case of a taxpayer other than a resident of the state the deductions allowed in this section shall be allowed only if, and to the extent that, they are connected with income arising from sources within the state and taxable under this article to a nonresident taxpayer; and the proper apportionment and allocation of the deductions with respect to sources of income within and without the state will be determined under rules and regulations to be prescribed by the tax commission.

12. In the case of any taxpayer, the deductions permitted by subdivisions one and two of this section shall not be allowed if, and to the extent that, they are connected with the production of income from moneyed capital taxable under article two, and the proper apportionment and allocation of such deductions with respect to revenue derived from such moneyed capital and other income shall be determined under rules and regulations to be prescribed by the tax commission.

13. In the case of any taxpayer who is the owner of shares of stock in a corporation organized and existing exclusively for the purpose of owning and operating a cooperative multiple dwelling no part of the net earnings of which inures or is calculated or intended to inure to the benefit of any stockholder or individual, and all the expenses of which are paid annually by the stockholders in proportion to their owner-

ship, a deduction shall be allowed to such taxpayer as to the share of his payments for all taxes, other than franchise taxes, paid or accrued by such corporation during the taxable year, and all interest paid or accrued by such corporation during the taxable year on its indebtedness.

§361. *Items not deductible.* In computing net income no deduction shall in any case be allowed in respect of:

1. Personal, living, or family expenses;

2. Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate;

3. Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made; or

4. Premiums paid on any life insurance policy, covering the life of any officer or employee, or of any person financially interested in any trade or business carried on by the taxpayer, when the taxpayer is directly or indirectly a beneficiary under such policy.

5. Any amount otherwise allowable as a deduction which is allocable to income not required to be included in gross income for the purposes of this article, unless the tax commission by regulation shall allow the same. The tax commission shall have power to make regulations for the apportionment or allocation of such deductions as between income which would be required to be included in gross income under this article and income which would not be required to be so included.

§362. *Exemptions.* The following exemptions shall be allowed to any taxpayer:

1. In the case of a single person, a personal exemption of one thousand dollars, or in the case of the head of a family or a married person living with husband or wife, a personal exemption of two thousand five hundred dollars. A husband and wife living together shall receive but one personal exemption. If such husband and wife make separate returns, the personal exemption may be taken by either or divided between them.

2. Four hundred dollars for each person (other than husband or wife) dependent upon and receiving his chief support from the taxpayer, if such dependent person is under eighteen years of age or is incapable of self-support because mentally or physically defective.

3. If the status of the taxpayer, in so far as it affects the exemptions allowed by this section, changes during his taxable year, such exemptions shall be apportioned, under rules and regulations prescribed by the tax commission, in accordance with the number of months before and after such change. For the purposes of this paragraph a fractional part of a month shall be disregarded unless it amounts to more than half a month, in which case it shall be considered as a month.

§363. *Credit for taxes in case of taxpayers other than residents of the state.* Whenever a taxpayer other than a resident of the state has become liable to income tax to the state or country where he resides upon his net income for the taxable year, derived from

sources within this state and subject to taxation under this article, the tax commission shall credit the amount of income tax payable by him under this article with such proportion of the tax so payable by him to the state or country where he resides as his income subject to taxation under this article bears to his entire income upon which the tax so payable to such other state or country was imposed; provided that such credit shall be allowed only if the laws of said state or country (1) grant a substantially similar credit to residents of this state subject to income tax under such laws or (2) impose a tax upon the personal incomes of its residents derived from sources in this state and exempt from taxation the personal incomes of residents of this state. No credit shall be allowed against the amount of the tax on any income taxable under this article which is exempt from taxation under the laws of such other state or country. This section as amended shall apply to taxes for the year nineteen hundred and nineteen and each year thereafter.

§364. *Partnerships.* Individuals carrying on business in partnerships shall be liable for income tax only in their individual capacity. There shall be included in computing the net income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the partnership is computed, then his distributive share of the net income of the partnership for any accounting period of the partnership ending within the fiscal or calendar year upon the basis of which the partner's net income is computed.

Taxpayers who are members of partnerships may be required by the tax commission to make a return stating the gross receipts and net gains or profits of the partnership for any taxable year. The net income of the partnership shall be computed in the same manner and on the same basis as provided in computing the net income of individuals except that the deduction provided in subdivision ten of section three hundred and sixty shall not be allowed and the personal exemptions provided for in section three hundred and sixty-two shall be allowed only to the individual partners.

§*365. Estates and trusts.* 1. The tax imposed by this article shall apply to estates and trusts, which tax shall be levied, collected and paid annually upon and with respect to the income of estates or of any kind of property held in trust, including:

a. Income received by estates of deceased persons during the period of administration or settlement of the estate;

b. Income accumulated in trust for the benefit of unborn or unascertained person or persons with contingent interests;

c. Income held for future distribution under the terms of the will or trust;

d. Income which pursuant to the terms of the trust is to be or may be applied to the payment of premiums upon life insurance or annuity contracts (except policies of insurance on the life of the trustor and annuities payable to the trustor and life insurance policies irrevocably payable for the purposes and in the man-

ner specified in subdivision ten of section three hundred sixty of this article, relating to the so-called "charitable contribution" deduction);

e. Income received during the liquidation of the assets of a corporation after its dissolution;

f. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct; and

g. Income of an estate during the period of administration or settlement permitted by subdivision three to be deducted from the net income upon which the tax is to be paid by the fiduciary.

2. The fiduciary shall be responsible for making the return of income for the estate or trust for which he acts, whether such income be taxable to the estate or trust or to the beneficiaries thereof. The net income of an estate or trust shall be computed in the same manner and on the same basis as provided in this article for individual taxpayers, except that there shall also be allowed as a deduction any part of the gross income which pursuant to the terms of the will or deed creating the trust, is paid to or held for the United States, any state, territory, or any political subdivision thereof, or the District of Columbia, or any corporation or association organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the bene-

fit of any private stockholder or individual; and except also that in a case under paragraph e of subdivision one of this section, in computing gain or loss on the sale, exchange or other disposition of the assets of a corporation that has been dissolved, the basis shall be the same is* if such assets had been acquired by the taxpayer at the same time, in the same manner and for the same consideration as they were acquired by the corporation which was dissolved, and had been owned from that time by the taxpayer; and in cases under paragraphs f and g of subdivision one of this section, the fiduciary shall include in the return a statement of each beneficiary's distributive share of such net income, whether or not distributed before the close of the taxable year for which the return is made.

3. In cases under paragraphs a, b, c, d and e of subdivision one of this section, the tax shall be imposed upon the estate or trust with respect to the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary.

In such cases, the estate or trust shall be allowed the same exemptions as are allowed to single persons under section three hundred sixty-two of this chapter, and in such cases an estate or trust created by or consisting of property of a person not domiciled within the state, an estate of a deceased person who at the time of death was not domiciled within the state and

* So in original (evidently should be "as").

a trust resulting from the dissolution of a foreign corporation shall be subject to tax only to the extent to which individuals other than residents are liable under this article.

4. In cases under paragraphs f and g of subdivision one of this section, if the distribution of income of a resident estate or trust is in the discretion of the fiduciary, either as to the beneficiaries to whom payable or as to the amounts to which any beneficiary is entitled, the tax shall be imposed upon the estate or trust in the manner provided in subdivision three of this section, but without the deduction of any amounts of income paid or credited to any such beneficiary. In all other cases under paragraphs f and g of subdivision one of this section, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the income of a beneficiary not a resident, derived through such estate or trust, shall be taxable only to the extent provided in this article for individuals other than residents.

5. A trust created by an employer as a part of a stock bonus, pension or profit-sharing plan for the ex-

clusive benefit of some or all of his employees, to which contributions are made by such employer, or employees, or both, for the purpose of distributing to such employees the earnings and principal of the fund accumulated by the trust in accordance with such plan, shall not be taxable under this section, but any amount actually distributed or made available to any distributee shall be taxable to him in the year in which so distributed or made available to the extent that it exceeds the amounts paid in by him.

6. Where any part of the income of a trust pursuant to the terms thereof is to be or may be applied to the payment of premiums upon policies of insurance on the life of the trustor (except policies of insurance irrevocably payable for the purposes and in the manner specified in subdivision ten of section three hundred sixty of this article, relating to the so-called "charitable contribution" deduction), or to the payment of premiums upon annuity contracts payable to the trustor, such part of the income of the trust shall be included in computing the net income of the trustor.

7. Income of an estate or trust with respect to which the tax is imposed upon the estate or trust shall not be included in the gross income of a beneficiary when distributed.

§*366. Information and payment at source.* 1. For the calendar year nineteen hundred and twenty and for each calendar year thereafter, every withholding agent shall deduct and withhold from all salaries, wages, commissions, gratuities, emoluments, perquisites and other fixed or determinable annual or periodical com-

pensation of whatever kind and in whatever form paid or received, earned by any taxpayer for personal services and taxable under this article, of which he shall have control, receipt, custody, disposal or payment, the following amounts: Two percentum of the first one thousand dollars or less, three per centum of the next two thousand dollars or less, four per centum of the next two thousand dollars or less, five per centum of the next two thousand dollars or less, six per centum of the next two thousand dollars or less, seven per centum of the excess over nine thousand dollars, by which the amount of such compensation paid or to be paid in the calendar year, by such withholding agent to such taxpayer, exceeds the amount of the exemptions granted to such taxpayer under section three hundred and sixty-two of this chapter as shown by a certificate filed with the withholding agent in form to be prescribed by the tax commission or one thousand dollars if no certificate showing his personal exemption status is filed with the withholding agent by a taxpayer other than a resident of this state. If it appears that another state has passed a law taxing incomes in such manner as will result in its residents being entitled to credit under section three hundred sixty-three hereof, sufficient to offset all taxes imposed by this article, the tax commission may, by regulation, relieve residents of such state from being required to make any return under this article, and may prescribe a form of certificate to be filed by residents of such state with withholding agents.

A withholding agent with whom such a certificate shall be filed, or with whom a certificate, in such form as shall be prescribed by the tax commission, to the ef-

fect that the person entitled to such compensation is a resident of this state and setting forth his residence address, shall be filed after the beginning of the calendar year and before the time when he is required to make return and payment, need not deduct or withhold anything from the compensation of the person filing such certificate.

The tax commission may, by regulation, require withholding agents to forward to it at stated times any of the certificates mentioned in this subdivision.

2. Every withholding agent shall make return to the tax commission of complete information concerning the amount of all interest, rent, salaries, wages, premiums, annuities, compensations, remunerations, emoluments or other fixed or determinable gains, profits and income, except interest coupons payable to bearer, of any taxpayer taxable under this article of one thousand dollars or more in any taxable year under such regulations and in such form and manner and to such extent as may be prescribed by the tax commission.

3. Every withholding agent required to make return of information under subdivision two of this section or required to deduct and withhold any tax under subdivision one of this section shall make return thereof on or before the fifteenth day of February in each year and every withholding agent required so to deduct and withhold any tax shall at the time of making such return pay the tax deducted and withheld to the tax commission. Every such withholding agent required so to deduct and withhold any tax is hereby

made liable for such tax and is hereby indemnified against the claims and demands of any individual, corporation or partnership for the amount of any payments made in accordance with the provisions of this section.

4. Income upon which any tax is required to be withheld at the source under this section shall be included in the return of the recipient of such income, but any amount of tax so withheld shall be credited against the amount of income tax as computed in such return.

5. If any tax required under this section to be deducted and withheld is paid by the recipient of the income, it shall not be recollected from the withholding agent; nor in cases in which the tax is so paid shall any penalty be imposed upon or collected from the recipient of the income or the withholding agent for failure to return or pay the same, unless such failure was fraudulent and for the purpose of evading payment.

§367. *Taxpayers' returns.* Every taxpayer having a net income for the taxable year (computed without reference to the capital gain and loss provisions contained in section three hundred fifty-one of this chapter) of one thousand dollars or over if single or if married and not living with husband or wife; or of two thousand five hundred dollars or over if married and living with husband or wife, or a gross income for the taxable year of five thousand dollars or over, regardless of the amount of his net income, shall make under oath a return stating specifically the items of his gross income and the deductions and credits allowed

by this article. For the purposes of this section any taxpayer other than a married person shall be deemed to be a single person. If a husband and wife living together have an aggregate net income computed as aforesaid (of two thousand five hundred dollars or over) or an aggregate gross income for such year of five thousand dollars or over, each shall make such a return, or the income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income. If the taxpayer is unable to make his own return the return shall be made by a duly authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer. A taxpayer other than a resident shall not be entitled to the deductions authorized by section three hundred sixty unless he shall make under oath a complete return of his gross income both within and without the state.

§367-a. *Returns in cases of changed residence.* If a taxpayer during the taxable year changes his status from that of a resident to that of nonresident, or from that of nonresident to that of resident, he shall file two returns, one as a resident covering the fraction of the year during which he was a resident, and one as a person other than a resident covering the fraction of the year during which he was a nonresident. The exemptions provided in section three hundred sixty-two of this article shall be divided ratably between the two returns so filed, according to time. In case two returns for one taxable year are filed as aforesaid, the taxes due thereon shall not be less than would be payable if the total net income shown by the two returns were included in a single return. If the aggregate of the tax

payer's net income from all sources during the fraction of the year in which he was a resident (computed without reference to the capital gain and loss provisions contained in section three hundred fifty-one of this chapter), and his net income (so computed) from sources within the state during the fraction of the year in which he was a nonresident, shall be less than one thousand dollars in the case of a taxpayer who is single, or married and not living with husband or wife, or under two thousand five hundred dollars in the case of a taxpayer who is married and living with husband or wife, no return shall be required under this section, unless the aggregate of the taxpayer's gross income from all sources during the fraction of the year in which he was a resident plus the aggregate of his gross income from sources within the state during the fraction of the year in which he was a nonresident is five thousand dollars or over, in which event returns shall be required.

§368. *Partnership returns.* Every partnership shall make a return for each taxable year, stating specifically the items of its gross income and the deductions allowed by this article, and shall include in the return the names and addresses of the individuals who would be entitled to share in the net income if distributed and the amount of the distributive share of each individual. The return shall be sworn to by any one of the partners.

§369. *Fiduciary returns.* Every fiduciary (except receivers appointed by authority of law in possession of part only of the property of a taxpayer) shall make under oath a return for the individual or estate or trust for whom he acts, as follows:

1. If he acts for an individual whose entire income from whatever source derived is in his charge and the net income of such individual (computed without reference to the capital gain and loss provisions contained in section three hundred fifty-one of this chapter) is one thousand dollars or over if single or if married and not living with husband or wife, or two thousand five hundred dollars or over if married and living with husband or wife, or whose gross income for the taxable year is five thousand dollars or over, regardless of the amount of his net income.

2. If he acts (a) for an estate of a deceased person during the period of administration or settlement, whether or not the income of such estate during such period of administration or settlement is properly paid or credited to any legatee, heir or other beneficiary; (b) for an estate or trust the income of which is accumulated in trust for the benefit of unborn or unascertained persons, or persons with contingent interests; or (c) for an estate or trust the income of which is held for future distribution or is distributable in the discretion of the fiduciary under the terms of the will or trust; and the net income of such estate or trust (computed without reference to the capital gain and loss provisions contained in section three hundred fifty-one of this chapter) is one thousand dollars or over or the gross income for the taxable year is five thousand dollars or over, regardless of the amount of the net income.

3. If he acts (a) for an estate or trust the income of which is to be distributed to the beneficiaries periodically; or (b) as the guardian of an infant whose in-

come is to be held or distributed as the court may direct; and any beneficiary of such estate or trust or such infant receives or is entitled to a distributive share of the income of one thousand dollars or more. The return made by a fiduciary shall state specifically the items of the gross income and the deductions, exemptions and credits allowed by this article. Under such regulations as the tax commission may prescribe, a return made by one of two or more joint fiduciaries shall be a sufficient compliance with the above requirement. The fiduciary shall make oath that he has sufficient knowledge of the affairs of the individual, estate or trust for whom or which he acts to enable him to make the return, and that the same is, to the best of his knowledge and belief, true and correct.

Fiduciaries required to make returns under this article shall be subject to all the provisions of this article which apply to taxpayers.

§370. *Returns when accounting period changed.* If a taxpayer, with the approval of the tax commission, changes the basis of computing net income from fiscal year to calendar year, a separate return shall be made for the period between the close of the last fiscal year for which return was made and the following December thirty-first. If the change is made from calendar year to fiscal year, a separate return shall be made for the period between the close of the last calendar year for which return was made and the date designated as the close of the fiscal year. If the change is made from one fiscal year to another fiscal year, a separate return shall be made for the period between the close of the former fiscal year and the date designated as the close

of the new fiscal year. If a taxpayer making his first return for income tax keeps his accounts on the basis of a fiscal year, he shall make a separate return for the period between the beginning of a calendar year in which such fiscal year ends and the end of such fiscal year.

In all of the above cases the net income shall be computed on the basis of such period for which separate return is made, and the tax shall be paid thereon at the rate for the calendar year in which such period is included; and the exemptions allowed in this article shall be reduced respectively to amounts which bear the same ratio to the full exemptions provided for as the number of months in such period bears to twelve months.

§371. *Time and place of filing returns.* Returns shall be made to the tax commission on or before the fifteenth day of the fourth month following the close of the fiscal year, or, if the return is made on the basis of the calendar year, then the return shall be made on or before the fifteenth day of April in each year. The tax commission may grant a reasonable extension of time for filing returns whenever in its judgment good cause exists and shall keep a record of every such extension and the reason therefor. Except in the case of taxpayers who are abroad, no such extension shall be granted for more than six months. Such returns shall set forth such facts as the tax commission may deem necessary for the proper enforcement of this article. There shall be annexed to such return the affidavit or affirmation of the person making the return, to the effect that the statements contained therein are

true. Blank forms of return shall be furnished by the tax commission upon application, but failure to secure the form shall not relieve any taxpayer from the obligation of making any return herein required.

§372. *Administration of income tax law.* The state tax commission shall administer and enforce the tax herein imposed for which purpose it may divide the state into districts in each of which a branch office of the state tax commission may be maintained; provided that in no cases shall a county be divided in forming a district.

§373. *Powers of tax commission.* 1. If in the opinion of the tax commission, any return of a taxpayer is in any essential respect incorrect, it shall have power to revise such return, or if any taxpayer fails to make return as herein required, the tax commission is authorized to make an estimate of the taxable income of such taxpayer from any information in its possession, and to audit and state an account according to such revised return or the estimate so made by it for the taxes, penalties and interest due the state from such taxpayer. Except in the case of a wilfully false or fraudulent return with intent to evade the tax, the amount of tax due under any return shall be determined by the tax commission within three years after the return was made, or, in the case of a taxpayer assessed in nineteen hundred and twenty-three for moneyed capital under chapter eight hundred and ninety-seven of the laws of nineteen hundred and twenty-three upon which assessment the taxpayer has actually paid a tax in his tax district, within three years after the refund to the taxpayer of the amount of tax so paid, or any part there-

of, on his moneyed capital assessment and in such a case interest and penalties shall not accrue until thirty days shall have elapsed after the refund. In the case of such wilfully false or fraudulent returns the amount of tax due may be determined at any time after the return is filed and the tax may be collected at any time after it becomes due, and where no return has been filed the tax may be assessed at any time.

2. The tax commission, for the purpose of ascertaining the correctness of any return or for the purpose of making an estimate of taxable income of any person where information has been obtained, shall also have power to examine or to cause to have examined, by any agent or representative designated by it for that purpose, any books, papers, records or memoranda bearing upon the matters required to be included in the return, and may require the attendance of the person rendering the return or any officer or employee of such person, or the attendance of any other person having knowledge in the premises, and may take testimony and require proof material for its information, with power to administer oaths to such person or persons.

3. Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time shall have the power, upon making a record of its reasons therefor in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certifi-

cate to the comptroller as provided by subdivision four of section three hundred and seventy-seven of this chapter.

§373-a. *Oaths and acknowledgments.* Such officials and employees of the income tax bureau of the department of taxation and finance as may be designated by the tax commission by resolution recorded in its minutes, shall have the power to administer an oath to any person, or to take the acknowledgment of any person in respect of any income tax report or return required by or pursuant to this article, or the rules and regulations of the tax commission.

§374. *Revision and readjustment of accounts by tax commission.* If an application for revision be filed with the tax commission by a taxpayer within two years from the time of the filing of the return, or if the tax of such taxpayer shall have been recomputed, then within one year from the time of such recomputation, the tax commission shall grant a hearing thereon and if it shall be made to appear, upon any such hearing by evidence submitted to it or otherwise, that any such computation includes taxes or other charges which could not have been lawfully demanded, or that payment has been illegally made or exacted of any such amount so computed, the tax commission shall resettle the same according to law and the facts, and adjust the computation of taxes accordingly, and shall send notice of its determination thereon to the taxpayer.

§375. *Review of determination of tax commission by certiorari and regulations as to writ.* The determination of the tax commission upon any application made

to it by any taxpayer for revision and resettlement of any computation of tax as prescribed by this article, may be reviewed in the manner prescribed by and subject to the provisions of section one hundred and ninety-nine of this chapter. No certiorari to review any statement of a computation or any determination by the tax commission under this article shall be granted unless notice of application therefor is made within ninety days after the service of the notice of such determination. Eight days' notice shall be given to the tax commission of the application for such writ. Before making the application the full amount of the taxes, interest and other charges audited and stated in such determination must be deposited with the tax commission and an undertaking filed with the commission, in such amount and with such sureties as a justice of the supreme court shall approve, to the effect that if such writ is dismissed or the determination of the tax commission affirmed, the applicant for the writ will pay all costs and charges which may accrue against him in the prosecution of the writ, including cost of all appeals, or at the option of the applicant such undertaking may be in a sum sufficient to cover the taxes, interest and other charges, audited and stated in such determination plus the costs and charges which may accrue against him in the prosecution of the writ, in which event the applicant shall not be required to pay such taxes, interest and other charges as a condition precedent to his application for the writ.

§*376. Penalties, additional taxes and interest.* 1. If any taxpayer, without intent to evade any tax imposed by this article, shall fail to make a return of income or pay any tax if one is due at the time required by or

under the provisions of this article, but shall voluntarily make a correct return of income and pay the tax due within sixty days thereafter, there shall be added to the tax an additional amount equal to five per centum thereof, but such additional amount shall in no case be less than two dollars, and an additional one per centum for each month or fraction of a month during which the tax remains unpaid.

If any withholding agent, without intent to evade any tax imposed by this article, shall fail to make a return and pay a tax withheld by him at the time required by or under the provisions of this article such withholding agent shall be liable for such tax and shall pay the same together with all penalties and interest charges thereon as provided in this subdivision or by subdivision two of this section and such additional amount of penalties and interest shall in no case be charged to or collected from the taxpayer by said withholding agent. The tax commission shall have the same rights and powers for the collection of such tax, penalties and interest against such withholding agent as are now prescribed by this article for the collection of a tax against an individual taxpayer.

2. If any taxpayer fails voluntarily to make a return of income or to pay a tax if one is due within sixty days of the time required by or under the provisions of this article, the tax, if it amounts to two dollars or more, shall be doubled, or if the tax is less than two dollars the sum of two dollars shall be added thereto, and the amount so determined shall be increased by one per centum for each month or fraction of a month from the time the tax was originally due to the date of payment.

3. Any individual, corporation or partnership, who, without fraudulent intent, shall fail to pay, or to deduct or withhold and pay any tax, or to make, render, sign or verify any return, or to supply any information, within the time required by or under the provisions of this article, shall be liable to a penalty of not more than five hundred dollars to be imposed, assessed and collected by the state tax commission in the same manner as is provided in this article with regard to taxes.

4. Any individual, corporation or partnership, or any officer or employee of any corporation, or member or employee of any partnership, who, with intent to evade any tax or any requirement of this article or any lawful requirement of the tax commission thereunder, shall fail to pay the tax, or to make, render, sign or verify any return, or to supply any information, within the time required by or under the provisions of this article, or who, with like intent, shall make, render, sign or verify any false or fraudulent return or statement, or shall supply any false or fraudulent information, shall be liable to a penalty of not more than one thousand dollars, to be recovered by the attorney-general, in the name of the people, by action in any court of competent jurisdiction, and shall also be guilty of a misdemeanor and shall, upon conviction, be fined not to exceed one thousand dollars or be imprisoned not to exceed one year, or both, at the discretion of the court.

5. The attorney-general shall have the power, with the consent of the tax commission, to compromise any penalty for which he is authorized to bring action un-

der subdivision four of this section. The penalty provided by subdivision four of this section shall be additional to all other penalties in this article provided.

6. The failure to do any act required by or under the provisions of this article shall be deemed an act committed in part at the office of the tax commission in Albany. The certificate of the tax commission to the effect that a tax has not been paid, that a return has not been filed, or that information has not been supplied, as required by or under the provisions of this article, shall be *prima facie* evidence that such tax has not been paid, that such return has not been filed, or that such information has not been supplied.

§*377. When payable.* 1. Each taxpayer shall, or in cases where an agent or guardian or other fiduciary makes return for the taxpayer on whose behalf he is acting, then the agent, guardian or other fiduciary shall, at the time of filing his return, pay to the tax commission the amount of tax payable hereunder as the same shall appear from the face of the return; provided, however, that if one-half of the tax shall be paid on or before the last day for the filing of the return, one-fourth may be paid on or before two months from the date limited for the filing of the return, and the remaining one-fourth on or before six months from the date limited for the filing of the return, except in a case where the time for the making of the return has been extended for more than six months, when the entire tax shall be paid at one time. If any installment of the tax is not paid on or before the date limited for its payment, the whole amount of the tax unpaid, with penalties and interest as prescribed in section three

hundred seventy-six of this chapter, computed from the due date of the delinquent installment, shall immediately become due and payable. If the time for filing the return shall be extended, there shall be paid, in addition to the tax, interest thereon at the rate of six per centum per annum for the period for which the extension was granted, which interest shall become due at the same time the tax itself becomes due. If the time for filing a return by a withholding agent shall be extended, the withholding agent shall pay interest as specified in the preceding sentence, and may not charge the same to the taxpayer.

2. As soon as practicable after the return is filed, the tax commission shall examine it and compute the tax.

3. If the amount of tax as computed shall be greater than the amount set forth in the return, the excess shall be paid by the taxpayer to the tax commission within ten days after the amount of the tax as computed shall be mailed by the tax commission. In such case, if the return is made in good faith and the understatement of the amount in the return is not due to any fault of the taxpayer, there shall be no interest, penalty or additional tax because of such undersatement, provided the deficiency be paid within ten days after notice of the amount be mailed to the taxpayer. If payment be not made within ten days, there shall be added to the amount of the deficiency five per centum thereof, and, in addition, interest at the rate of one per centum per month for each month or fraction of a month calculated from the date of the notice, and any unpaid installment of the amount set forth in the

return shall immediately become due and payable, together with penalties and interest as prescribed under section three hundred seventy-six of this chapter, computed from the date of such notice. If the understatement is due to negligence on the part of the taxpayer but without intent to defraud, there shall be added to the amount of the deficiency five per centum thereof, and in addition, interest at the rate of one per centum per month for each month or fraction of a month. If the understatement is false or fraudulent with intent to evade the tax, the tax on the additional income discovered to be taxable shall be doubled and an additional one per centum shall be added to the amount so due for each month or fraction of a month. Except as otherwise provided in this subdivision, the interest provided for in this subdivision shall in all cases be computed from the date the tax was originally due to the date of payment.

4. If the amount of tax as computed shall be less than the amount set forth in the return any amount that has been paid in excess of the amount that would have been due if the return had correctly set forth the amount of tax shall be allowed as a credit against any unpaid installments, or, if there be no unpaid installments, or if the amount to be credited exceeds the unpaid installments, an appropriate refund shall be made by the comptroller out of the proceeds of the tax retained by him as provided in this article. Such refund shall be made only upon a certificate of the commission approved by the comptroller. The comptroller, as a condition precedent to the approval of such a certificate, may examine into the facts as disclosed by the income tax return and the other information and data available in the files of the commission.

§379. *Collection of taxes; penalties and interest.* 1. The tax commission is authorized at its discretion to designate agents for the purpose of collecting income taxes and shall require from them reasonable bond.

2. The tax commission shall have the power, in its discretion, to suspend the accruing of all penalties upon any additional tax assessed by virtue of the provisions of section three hundred and seventy-seven of this chapter and to extend the time for payment of such assessment in any case where due application has been made for a revision and readjustment of the same under section three hundred and seventy-four of this chapter to not later than thirty days after the service of the notice of a determination thereon, and, upon making a record of its reasons therefor, to waive or reduce any of the additional taxes or interest provided in section three hundred and seventy-six, subdivisions one and two, and section three hundred and seventy-seven, subdivision three, of this article, or to compromise the same.

§380. *Warrant for the collection of taxes.* If any tax imposed by this article or any portion of such tax be not paid within sixty days after the same becomes due, the tax commission shall issue a warrant under its official seal directed to the sheriff of any county of the state commanding him to levy upon and sell the real and personal property of the person owning the same, found within his county, for the payment of the amount thereof, with the added penalties, interest and the cost of executing the warrant, and to return such warrant to the tax commission and pay to it the money collected by virtue thereof within sixty days after the receipt of such warrant.

The sheriff shall within five days after the receipt of the warrant, file with the clerk of his county a copy thereof, and thereupon the clerk shall enter in the judgment docket, in the column for judgment debtors the name of the taxpayer mentioned in the warrant, and in appropriate columns the amount of the tax or portion thereof and penalties for which the warrant is issued and the date when such copy is filed, and thereupon the amount of such warrant so docketed shall become a lien upon the title to and interest in real property or chattels real of the person against whom it is issued in the same manner as a judgment duly docketed in the office of such clerk. The said sheriff shall thereupon proceed upon the same in all respects, with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgments of a court of record, and shall be entitled to the same fees for his services in executing the warrant, to be collected in the same manner. In the discretion of the tax commission a warrant of like terms, force and effect may be issued and directed to any agent authorized to collect income taxes, and in the execution thereof such agent shall have all the powers conferred by law upon sheriffs, but shall be entitled to no fee or compensation in excess of actual expenses paid in the performance of such duty. If a warrant be returned not satisfied in full, the tax commission shall have the same remedies to enforce the claim for taxes against the taxpayer as if the people of the state had recovered judgment against the taxpayer for the amount of the tax. The tax commission, if it finds that the interests of the state will not thereby be jeopardized, and upon such conditions as it may exact, may release any real property or chattels real from the

lien of any warrant for unpaid taxes filed pursuant to this section, and such release may be recorded in the office of any recording officer in which such warrant has been filed.

§381. *Action for recovery of taxes.* Action may be brought at any time by the attorney-general of the state at the instance of the tax commission, in the name of the state to recover the amount of any taxes, penalties and interest due under this article.

§382. *Distribution of the income tax.* All revenue collected or received by the commission under this article shall be deposited daily with such responsible banks, banking houses or trust companies as may be designated by the comptroller, and to the credit of the comptroller of the state of New York. Such deposits shall be kept separate and apart from all other moneys in the possession of the comptroller. The comptroller shall require adequate security from all such depositories. Of the revenue collected under this article the comptroller shall retain in his hands sufficient to provide at all times a fund in his hands in the sum of two hundred fifty thousand dollars out of which he shall pay any refunds to which taxpayers shall be entitled under the provisions of this article. Of the remainder, there shall be paid into the state treasury to the credit of the general fund a sum equal to the penalties and interest included in the revenue collected or received as aforesaid and the balance remaining after making the payments hereinafter provided for. Not later than the first day of July, and in case of moneys subsequently collected at least quarterly thereafter, there shall be distributed and

paid to the treasurers of the several counties of the state, fifty per centum of the revenue that would have been collected or received under this article (exclusive of penalties and interest and not including any revenues under sections three hundred fifty-one-c, three hundred fifty-one-d, three hundred fifty-one-e and three hundred fifty-one-f of this chapter) if the rates of tax imposed hereunder on net income had remained as follows: One per centum of the amount of net income not exceeding ten thousand dollars, two per centum of the amount of net income in excess of ten thousand dollars but not in excess of fifty thousand dollars; three per centum of the amount of net income in excess of fifty thousand dollars without the provision for minimum taxes. Such distribution shall be made in the proportion that the assessed valuation of the real property of each county bears to the aggregate assessed valuation of the real property of the state. The tax commission shall in due time for the distribution thereof certify to the comptroller the apportionment to the various counties of the share of taxes received under this article to which they are entitled and upon verification and approval of such apportionment by him the comptroller shall distribute such share of the tax moneys in accordance with the provisions of this article. As to any county included in the city of New York such payment shall be made to the receiver of taxes in such city and be paid into the general fund for the reduction of taxation of the city of New York. The county treasurer shall apportion the amount so received among the several towns and cities within the county, except a city containing a part of a town, in proportion that the assessed valuation of the real property of each town or city bears

to the aggregate assessed valuation of the real property of the county. The county treasurer shall pay the amount so apportioned to each city to the chief fiscal officer of the city to be paid into the general fund for city purposes; and in a county having more than three towns and adjoining a city of the first class having a population of one million and upwards, the county treasurer shall pay the amount so apportioned to the supervisor of the town and such amount shall be by him credited to general town purposes, and such amounts shall not be apportioned or distributed as hereinafter provided. If a town does not contain any part of a city or village, the county treasurer shall pay the amount so apportioned to the town to the supervisor of the town. If one or more incorporated villages or cities be wholly or partly within a town, the county treasurer shall divide the amount apportioned to such town between such town and such village, villages or city in the proportions that the assessed valuations of the real property of such town, as appears by the last preceding town assessment-roll, and of the real property of such village, villages or city, or the portion thereof wholly within such town, as appears by the last preceding village or city assessment-roll, bear respectively to the aggregate assessed valuation of the real property of such town and of such village, villages or city, determined by adding together the assessed valuation of the real property of the town, as appears by the last preceding town assessment-roll and the assessed valuation of the real property of such village, villages or city, or the portion thereof wholly within such town, as appears by the last preceding village or city assessment-roll, as the case may be. If two or more villages be entitled to

share in such division, the county treasurer shall divide between them the amount to which they are entitled in the proportions that the assessed valuation of the real property of such villages located in the town, as appears by the last preceding village assessment-rolls bears to the aggregate assessed valuations of the real property of such villages located in such town, as so determined. Except that if one or more incorporated villages or cities be wholly or partly within a town and such town be in a county adjacent to a city of the first class and such county has within it not more than three towns, the county treasurer of such county shall divide the amount apportioned to such town between such town and such village, villages or city or the portion thereof wholly within such town, in the proportion that the assessed valuation of the real property of each such village or city respectively or part thereof in such town, as the same appears upon the last preceding assessment-roll used for state and county tax purposes, bears to the aggregate assessed valuation of the real property of the entire town as appears upon the last preceding assessment-roll used for state and county tax purposes. The county treasurer shall pay over to the chief fiscal officer or officers of such village or villages or such city the amount to which such village, villages or city is entitled in accordance with the above apportionment, and shall pay the remaining portion thereof to the supervisor of the town. Except as hereinafter provided, upon the distribution of such revenues to any town the supervisor shall, with the approval of the town board, distribute not to exceed one-third of such allotment to such town among the several school districts in the towns in the proportions that the assessed valuation of the real

property of each of such school districts, respectively, or part thereof in such town as the same appears upon the last preceding town assessment-roll bears to the aggregate assessed valuation of the real property of the entire town, but the amount so distributed to any school district for any one year shall not exceed one-fourth of the amount raised by taxation in such school district for school purposes during the preceding year, and the excess, if any, not so distributed to any such district shall be retained by the supervisor and credited, together with the remaining two-thirds of such total allotment, to general town purposes. However, the town board, by resolution, may direct the supervisor to retain all such moneys allotted to the town, in which case such one-third shall not be so distributed to the school districts, but all moneys so allotted to the town shall be credited to general town purposes.

§383. *Tax commission to make regulations and to collect facts.* The tax commission is hereby authorized to make such rules and regulations, and to require such facts and information to be reported, as it may deem necessary to enforce the provisions of this article. Rules and regulations of the comptroller in force when this section as amended takes effect shall continue in force as the rules and regulations of the tax commission until amended or repealed by the tax commission.

§384. *Secrecy required of officials; penalty for violation.* 1. Except in accordance with proper judicial order or as otherwise provided by law, it shall be unlawful for the tax commission, any tax commissioner, agent, clerk, or other officer or employee

to divulge or make known in any manner the amount of income or any particulars set forth or disclosed in any report or return required under this article. The officers charged with the custody of such reports and returns shall not be required to produce any of them or evidence of anything contained in them in any action or proceeding in any court, except on behalf of the tax commission, in an action or proceeding under the provisions of this chapter, to which it is a party, or on behalf of any party to any action or proceeding under the provisions of this article when the reports or facts shown thereby are directly involved in such action or proceeding, in either of which events the court may require the production of, and may admit in evidence, so much of said reports or of the facts shown thereby, as are pertinent to the action or proceeding and no more. Nothing herein shall be construed to prohibit the delivery to a taxpayer or his duly authorized representative of a certified copy of any return or report filed in connection with his tax nor to prohibit the publication of statistics so classified as to prevent the identification of particular reports or returns and the items thereof, or the inspection by the attorney-general or other legal representatives of the state of the report or return of any taxpayer who shall bring action to set aside or review the tax based thereon, or against whom an action or proceeding has been instituted in accordance with the provisions of sections three hundred and eighty and three hundred and eighty-one of this chapter. Reports and returns shall be preserved for three years and thereafter until the tax commission orders them to be destroyed.

2. Any offense against subdivision one of this section shall be punished by a fine not exceeding one thousand dollars or by imprisonment not exceeding one year, or both, at the discretion of the court, and if the offender be an officer or employee of the state he shall be dismissed from office and be incapable of holding any public office in this state for a period of five years thereafter.

3. Notwithstanding the provisions of this section, the tax commission may permit the commissioner of internal revenue of the United States, or the proper officer of any state imposing an income tax upon the incomes of individuals, or the authorized representative of either such officer, to inspect the income tax returns of any individuals, or may furnish to such officer or his authorized representative an abstract of the return of income of any individual or supply him with information concerning any item of income contained in any return, or disclosed by the report of any investigation of the income or return of income of any individual; but such permission shall be granted or such information furnished to such officer or his representative only if the statutes of the United States or of such other state, as the case may be, grant substantially similar privileges to the proper officer of this state charged with the administration of the personal income tax law thereof.

§385. *Contract to assume income tax illegal.* It shall be unlawful for any person to agree or contract directly or indirectly to pay or assume or bear the burden of any tax payable by any taxpayer under the provisions of this article. Any such contract or agreement shall be null and void and shall not be enforced or given effect by any court.

APPENDIX B.

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THE NATURE OF THE INCOME TAX

By ROBERT C. BROWN*

With the income tax a settled and important part of the fiscal system of the federal government and of an increasing number of states, the importance of a thorough understanding of the various ramifications of this tax is clearly apparent. The literature on this subject, both official and unofficial, is enormous; yet we have little discussion of the precise nature of the tax. It is the purpose of this article to consider this question.

The problem of ascertaining the nature of this or any other tax is primarily of seeing whether it fits into the accepted categories of taxation, and if so where. What these accepted categories are is not doubtful. Cooley[1] states that there are three kinds of taxes, as follows: (1) capitation or poll taxes, (2) taxes on property, and (3) excise taxes. This classification would be generally accepted.[2] But curiously enough, two early state cases[3] in classifying taxes omitted excise taxes and substituted income taxes. It is obvious that such a classification will not do now, though this

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[1] Cooley, Taxation, 4th ed., sec. 38.
[2] See, Taxation, 26 R. C. L. 34.
[3] Savannah v. Hartridge, (1850) 8 Ga. 23; Glasgow v. Rowse, (1869) 43 Mo. 479.

early segregation of income taxes as a separate class may possibly throw some light upon their real nature.

Our problem, then, is to determine whether the income tax is a capitation tax, a property tax, an excise tax, or a tax falling into none of these categories and therefore *sui generis*. As will shortly appear, this is a question which has received comparatively few direct answers, and these few decidedly conflicting.[4] Where a court feels able to do so, it generally refrains from deciding the problem of the nature of the income tax.[5] One of the most recent writers on an income tax problem involving this question admits the present uncertainty as to the nature of this form of taxation.[6]

It must not be thought, however, that this is a purely theoretical question. It is of immediate practical importance in at least two classes of income tax problems. The first of these is as to the allocation of income for taxation purposes between states. It is true that the answer to this problem does not depend entirely upon the nature of the tax,[7] but when domicile, property and business activities are separated into different states, it is obviously quite important which of these is regarded as the basis of the tax. Also the matter is important in connection with the usual constitutional requirements for property taxes, of equality and uniformity.[8] If the income tax is a property tax, it would usually involve double taxation of the property from which the income is derived, and its

[4] See 4 Cooley, Taxation, 4th ed., secs. 1743, 1745; also Taxation, 26 R. C. L. 142.
[5] Shields v. Williams, (1929) 159 Tenn. 349, 19 S. W. (2d) 261.
[6] See Huston, Allocation of Corporate Net Income for Purposes of Taxation, (1932) 26 Ill. L. Rev. 725.
[7] See Rottschaefer, State Jurisdiction of Income for Tax Purposes, (1931) 44 Harv. L. Rev. 1075. See also Huston, Allocation of Corporate Net Income for Purposes of Taxation, (1932) 26 Ill. Rev. 725.
[8] See Rottschaefer, A State Income Tax and the Minnesota Constitution, (1928) 12 Minnesota Law Review 683.

exemptions and graduated rates would run it into serious danger of conflict with such constitutional provisions. It follows that, in these connections at least, the problem of the nature of the income tax is of practical as well as theoretical importance.

The Income Tax as a Personal Tax

The most obvious method to attack our problem is to consider each of the above-mentioned accepted categories of taxes, and to ascertain whether the income tax can be fitted into it. The first of these categories is the capitation or poll tax, which is levied upon the taxpayer simply because he is a human being subject to the jurisdiction of the taxing power. It is thus a personal tax in the strictest sense.

Obviously the income tax does not fit here. In the first place, a capitation tax is uniform,[9] and an income tax is intentionally made far from uniform both in application and rate. It is not surprising, therefore, that a claim that an income tax was a poll tax was rejected without discussion by the supreme court of Georgia.[10]

The same argument was treated with little more consideration by the federal Supreme Court, when it decided in *Shaffer v. Carter*,[11] that a state may levy an income tax upon a non-resident with respect to property owned and business transacted within the state. The taxpayer argued that the income tax was a purely personal tax, and so could not be levied upon non-

[9] 1 Cooley, Taxation, 4th ed., sec. 40.
[10] Featherstone v. Norman, (1930) 170 Ga. 370, 153 S. E. 58.
[11] (1920) 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445.

residents. The Court brushed aside this argument with the rather contemptuous remark that this was a mere matter of the definition of the tax, and so not worthy of consideration. But it is respectfully submitted that this matter of definition was the very point on which this aspect of the case turned. Jurisdiction to impose a personal tax depends on the domicile of the taxpayer.[12] Since the Court decided that the tax could be imposed against a non-resident, it necessarily held that an incmoe tax is not a personal tax.

But that an income tax has certain rather definite analogies to a personal tax is apparent from the decision in *Cook v. Tait*,[13] which holds that a federal income tax can be imposed upon a United States citizen residing in Mexico, and holding no property and transacting no business in this country. The decision seems abundantly sensible, since the taxpayer was undoubtedly receiving protection and other advantages as an American citizen; otherwise he would presumably have become a Mexican citizen.[14] Yet no property or excise tax could have been levied by the United States, since the taxpayer held no property and transacted no business within its jurisdiction.

The tax sustained in this case cannot be regarded as strictly a personal tax, since it depends upon nationality rather than domicile. Yet the analogy is certainly close, and it would seem that this doctrine would permit a state to collect an income tax from any of its citizens residing in another state, merely by reason of citizenship in the state imposing the tax. The

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[12] 4 Cooley, Taxation, 4th ed., sec. 1777.
[13] (1924) 265 U. S. 47, 44 Sup. Ct. 444, 68 L. Ed. 895.
[14] See Levitt, Income Tax Predicated upon Citizenship: Cook v. Tait, (1925) 11 Va. L. Rev. 607.

court, however, by way of dictum, expressed the opinion that this could not be done, obviously relying on the provision of the federal constitution that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens . . . of the state wherein they reside."[15] It would appear from this that it would be legally impossible for a person to be a citizen of a state other than that where he resides. However, the Court has held otherwise, stating that residence and citizenship are not the same for all purposes.[16]

This question must be left unsettled; at any rate, it is not of immediate importance in our problem. But we can conclude with confidence that the income tax, while having considerable analogy to a personal tax, cannot be put into this category.

The Income Tax as a Property Tax

The next category into which we must attempt to fit our subject is the property tax. Here we are confronted with two possibilities. It might be contended that an income tax is really a tax upon the property from which the income is derived; or it may be that the income itself is the property which is taxed. If either of these hypotheses can be sustained, the income tax may be regarded as a property tax.

The first of these assumptions, that the tax is upon the property from which the income is derived, is subject to obvious objections. It may do well enough with

[15] Fourteenth amendment, section 1.
[16] Douglas v. New York, etc., R. Co., (1929) 279 U. S. 377, 49 Sup. Ct. 355, 73 L. Ed. 747.

respect to such income as is in fact derived from property in the usual sense, though, as already shown, that is apt to lead to difficulties with state constitutional requirements of equality and uniformity. But what of income earned by the personal efforts of the taxpayer? Here there is no property from which the income is derived, unless it be the taxpayer's earning power; and it is certainly stretching the usual conception to call this property. But even if this difficulty can be surmounted, a more serious one remains. In theory at least, and to a large extent in practice, property is taxed according to its actual value, not according to what it actually produces. A vacant lot is taxed although it produces no revenue and even though it is an expense to its owner to maintain it. No doubt earning power is an important element in the value of property; but the actual earnings, being largely within the control of the owner, are not regarded as decisive on this point. But if this income tax is imposed upon the taxpayer's earning power as property, all of these elementary principles are set at naught. If the taxpayer earns nothing because he does not work or because of other contingencies, he pays nothing, though his earning power is enormous; if, on the other hand, he, through good fortune, receives a greater income than would be justified by his earning power, he must pay a tax on this whole income. It is submitted, therefore, that the conception of a general income tax as a tax upon the property from which the income is derived is an absurd and impossible one.

Yet few readers will need to be reminded that the United States Supreme Court has decided that an income tax is a direct tax upon property from which the

income is derived. The case referred to is, of course, *Pollock v. Farmers' Loan & Trust Co.*, which held unconstitutional as a direct and unapportioned tax, the federal income tax attempted to be imposed in 1894. On the first hearing[17] the court held the law unconstitutional so far as it purported to tax rents received from land, on the theory that this was a direct tax on that land. The Court was evenly divided as to the validity of the tax so far as it covered income from personal property; so this point was reargued. But at this second hearing[18] the majority of the Court took the position that this too was invalid, on the ground that a tax on the income from personal property is in effect a tax upon that property, and so cannot be levied by the federal government without apportionment.

The Court, believing that the invalidating of these portions of the income tax would cause the whole scheme to fail, declared the entire income tax unconstitutional. It did not, however, purport to overrule *Springer v. United States*,[19] which had sustained a general income tax imposed by the federal government during the Civil War period, but distinguished that case on the ground that there the taxpayer had not shown that he received any income from property.

The *Pollock Case* certainly enunciated revoluntionary doctrine, and it received then and long after equally violent criticism, though it may be doubted whether its doctrine was ever more vigorously or effectively attacked than in the numerous dissenting opinions in

[17](1895) 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759.
[18](1895) 158 U. S. 601, 15 Sup. Ct. 912, 39 L. Ed. 1108.
[19](1880) 102 U S. 586, 26 L. Ed. 253. The Court in this case relied on the very early case of Hylton v. United States, (1796) 3 Dall. 171, 1 L. Ed. 169, where the opinion was expressed that the only direct taxes within the meaning of the constitution were capitation and land taxes.

the case itself. But it is hardly worth while for us to consider the soundness of the doctrine. Sound or not, there it is. And it still stands as constitutional doctrine, notwithstanding the Sixteenth Amendment, for the Court has repeatedly insisted that that amendment did not give the federal government the power to impose an income tax or make it indirect; but it merely removed the necessity of apportioning the income tax, which, however, remains a direct tax.[20] The *Pollock Case* remains a very important authority with respect to our problem, for if an income tax is direct it is so only because it is a tax upon the property from which the income is derived, and so a property tax.

It is obvious also that the same doctrine is applicable to state taxes, at least so far as the nature of the tax is concerned; and the Supreme Court has recognized this, by holding that a state may tax a non-resident on income derived by him from property within the state.[21] The Court has also said that a state may tax the net income of property as well as the net income of its owner.[22] And the numerous authorities invalidating state income taxes which burden income derived from federal securities, or the federal income tax when it includes income from state securities are also authorities that an income tax is, in its nature, at least partly a property tax imposed upon the property from which the income is derived.[23]

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[20]Brushaber v. Union Pacific R. Co., (1916) 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493; Evans v. Gore, (1920) 253 U. S. 245, 40 Sup. Ct. 550, 64 L. Ed. 887; Miles v. Graham, (1925) 268 U. S. 501, 45 Sup. Ct. 601, 69 L. Ed. 1067.

[21]Shaffer v. Carter (1920) 252 U. S. 37, 40 Sup. Ct. 221, 64 L. Ed. 445. See also DeGanay v. Lederer, (1919) 250 U. S. 376, 39 Sup. Ct. 524, 63 L. Ed. 1042

[22]Atlantic Coast Line v. Doughton, (1923) 262 U. S. 413, 43 Sup. Ct. 620, 67 L. Ed. 1051.

[23]See Brown, Restrictions on State Taxation Because of Interference with Federal Functions, (1931) 17 Va. L. Rev. 325.

In general, however, the states have not accepted this doctrine. Massachusetts alone seems to have accepted it in full. The Massachusetts court has regularly held that the state income tax is a property tax imposed upon the property from which the income is derived, and so is subject to the limitations imposed by the state constitution upon the levy of property taxes.[24] As the court says in *Hart v. Tax Commission*:[25]

> "It follows that our income tax is not . . an excise. . . . In this respect it may differ from the federal income tax, which apparently in some aspects and applications may be an excise. . . . Nor is it a personal tax. Accordingly, the doctrine of '*mobilia personam sequuntur*' has no application. It is laid directly on the income of property, and as already stated is in reality a tax on the property itself."[26]

But even the Massachusetts court is not wholly consistent on this point. In *Wilcox v. County Commissioners*,[27] the court held that a resident of Medford who carried on business in Boston, where he was taxed on his stock-in-trade, might be subjected to an income tax in Medford. It was held that the Medford income tax was not on the stock-in-trade, though the income was derived from it, the court saying as to such income:

> "It is the net result of many combined influences: the use of the capital invested; the personal labor and services of the members of the firm; the skill and ability with which they lay in, or from time to time renew, their stock; the carefulness and good judgment with which they sell and give

[24] Opinion of the Justices, (1915(220 Mass. 613, 108 N. E. 570; Maguire v. Tax Commissioner, (1918) 230 Mass. 503, 120 N. E. 162, affirmed in Maguire v. Trefry, (1920(253 U. S. 12, 40 Sup. Ct. 417, 64 L. Ed. 739; Trefry v. Putnam, (1917) 227 Mass. 522, 116 N. E. 904. But see, Eaton, etc., Co. v. Commonwealth, (1921) 237 Mass. 523, 130 N. E. 99.

[25] (1921) 240 Mass. 37, 132 N. E. 621.

[26] (1921) 240 Mass. 37, 39, 132 N. E. 622.

[27] (1870) 103 Mass. 544.

> credit; and the foresight and address with which they hold themselves prepared for the fluctuations and contingencies affecting the general commerce and business of the country. To express it in a more summary and comprehensive form, it is the creation of capital, industry, and skill."[28]

It may be added that this seems a perfect demonstration that an income tax cannot properly be regarded as a mere tax upon the property from which the income is derived.

The court has also held that money in the bank is subject to a general property tax, although such money was derived from a source which is exempt from an income tax.[29] If an income tax is a property tax, it would seem that exemption from income tax should involve exemption from other property taxes.

But the Massachusetts court has adhered to its theory that an income tax is a tax upon the property from which the income is derived, notwithstanding the amendment to the state constitution intended to remove most restrictions from the legislative power to impose income taxes. It has therefore recently held that since property of the same class must be taxed at uniform rates, an income tax at graduated rates cannot be levied.[30]

A few other states have shown some tendency to take the same position, though less clearly and con-

[28](1870) 103 Mass. 544, 546.
[29]Loring v. Beverly, (1916) 222 Mass. 331, 110 N. E. 974.
[30]In re Opinion of Justices (1929) 266 Mass. 583, 165 N. E. 900. See also Trefry v. Putnam, (1917) 227 Mass. 522, 116 N. E. 904. The court is obviously correct in its position that if the income tax is a property tax, it cannot properly be levied at graduated rates. See Hackett, The Constitutionality of the Graduated Income Tax Law, (1916) 25 Yale L. J. 427.

sistently than Massachusetts. Thus New Hampshire has recently decided that residents cannot be subjected to income taxes on income derived from property outside the state, on the ground that such a tax would burden such property;[31] but, as will be seen later, the New Hampshire court has been far from consistent in its holdings as to the nature of the income tax. The supreme court of South Carolina has held directly to the contrary as to the power of the state to impose a tax upon income derived by residents from property outside the state.[32] But it may be that the court has a similar idea as to the nature of the income tax for it remarks that its chief purpose is to tax each outside income; income from within the state can be reached by the ordinary property and excise taxes.

Most other state courts, if they concede any validity at all to this theory, very wisely do not permit it to hamper the imposition of an income tax by applying the property tax restrictions.[33] And many state courts reject this theory altogether. The position of these courts is well exemplified by the statement of the Wisconsin Supreme Court in the recent case of *Norris v. Wisconsin Tax Comm.*,[34] when it said: "An income tax is not a tax on property, but a tax against the recipient of the income."[35]

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[31]Opinion of Justices, (1930) 84 N. H. 559, 149 Atl. 321. The United States Supreme Court has, however, recently decided that a state may, so far as the federal constitution is concerned, validly impose a tax upon the entire income of resident individuals, though a substantial part of such income is derived from sources outside of the state. Lawrence v. State Tax Commission, (1932) 286 U. S. 276, 52 Sup. Ct. 556. The Court further held that no constitutional objection arose from the fact that domestic corporations were subjected to tax only upon income from sources within the state.

[32]Crescent Mfg. Co. v. Tax Commission, (1924) 129 S. C. 480, 124 S. E. 761.

[33]See Shields v. Williams, (1929) 159 Tenn. 349, 19 S. W. (2d) 261, and Drexel v. Commonwealth, (1863) 46 Pa. St. 31.

[34](1931) 205 Wis. 626, 238 N. W. 415.

[35](1931) 205 Wis. 626, 631, 238 N. W. 415, 416.

It is submitted, therefore, that the theory of the income tax as a property tax upon the property from which the income is derived is inaccurate, or at least inadequate. Besides the theoretical objections which have been stated, it is utterly inconsistent with the almost unanimous view that both property and the income from it may be taxed without violating state constitutional provisions against double taxation.[33] Accordingly, the theory that an income tax is a property tax must be rejected, unless it is to be regarded as a tax upon the income itself as property.

This is unquestionably a more reasonable theory, and one which is somewhat more widely accepted. Income when first received, in any form, is certainly property, and to tax it as such obviates the objection to the other branch of the property tax theory, which has just been considered, that not all income is derived from property. It may be said that nevertheless all income *is* property.

The theory that the income tax is a property tax imposed upon the income itself as property has been definitely, though after much argument and disagreement, accepted by the supreme court of Alabama in the leading case of *Eliasberg Bros. v. Grimes.*[37] In that case the court attempted to answer the most obvious objection to this theory, that the taxpayer may not still have all his income on the tax day, by saying:

> "Nor is it of consequence that the money thus taxed has left the hands of its quondam owner, however speedily; for the state has the inherent power to tax property owned at any time during the tax year, though it has not always seen fit to do so."[38]

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[36] 1 Cooley, Taxation, 4th ed., sec. 237; 4 Cooley, Taxation, 4th ed., sec. 1756.

[37] (1920) 204 Ala. 492, 86 So. 56.

[38] (1920) 204 Ala. 492, 498, 86 So. 61. See also Ex parte Morrill, (1925) 213 Ala. 697, 106 So. 63.

But even admitting, what may be seriously doubted, that a tax upon all the property which a person had possessed at any time during a period of time could be sustained as a property tax, yet there is still more serious difficulty. To tax a person upon all the income which he received during such a period as property and then again tax all the property into which he may have converted that income and which he possesses on the tax day is certainly double taxation of property.

In spite of this difficulty, the theory now under consideration is accepted in Delaware,[39] and was for a time apparently accepted in New Hampshire.[40] In the New Hampshire case just cited, there was an able dissenting opinion by Justice Peaslee from which the following is quoted:

> "It is important that at the outset the fundamental difference between income and property be stated; and then as we go on it will be more plainly seen how and why the attempt to treat the two things as one must necessarily fail. A man's property is the amount of wealth he possesses at a particular moment while his income is the amount of wealth obtained during some specified period. The two are measured by different standards. One is measured by amount and present possession. The other is determined by receipts, and quantity and time are necessary elements of the measure employed. In the measure of property present ownership is an essential element, and lapse of time can have no place. In the measure of income lapse of time is an essential element, and present possession can have no place. Each is measurable, but a common measure could be applied to both. The two are as incommensurate as a line and an angle."[41]

[39] State v. Pinder, (1919) 30 Del. 416, 108 Atl. 43.
[40] In re Opinion of Justices, (1915) 77 N. H. 611, 93 Atl. 311.
[41] (1915) 77 N. H. 611, 618, 93 Atl. 314.

This reasoning seems unanswerable, and it seems eventually to have persuaded the court, since some years later the court decided that an income tax is not a property tax and so may be levied at graduated rates.[42] The court pointed out that an income tax is not really an annually recurring tax, as is the ordinary property tax. An income tax is generally collected annually, but its amount depends on the activities of the taxpayer and their productiveness during the specified period.

Two other state cases [43] might possibly be cited in favor of the theory that an income tax is a tax on the income as property, but they are by no means clear. It is apparent, therefore, that there is comparatively little authority in favor of this theory, either.

Indeed, the authorities to the contrary are much more impressive. The cases in Georgia extending over a long period squarely reject the idea that income can be regarded as property for tax purposes.[44] The same is true of the Missouri decisions [45]. In a comparatively recent decision in this state, *Ludlow-Saylor Wire Co. v. Wollbrink,* [46] the argument already spoken of that income itself is property was pressed upon the court; but the court answered that while it is true that income is property it is not the kind of property which is contemplated as taxable according to the ordinary rules for property taxation.

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[42]In re Opinion of Justices, (1927) 82 N. H. 561, 138 Atl. 284. But see Opinion of Justices, (1930) 84 N. H. 559, 149 Atl. 321.

[43]New Orleans v. Fourchy, (1878) 30 La. Ann. 910; Alderman v. Wells, (1910) 85 S. C. 507, 67 S. E. 781. Cf. Crescent Mfg. Co. v. Tax Commission, (1924) 129 S. C. 480, 124 S. E. 761.

[44]Savannah v. Hartridge, (1850) 8 Ga. 23; Waring v. Savannah, (1878) 60 Ga. 93; Featherstone v. Norman, (1930) 170 Ga. 370, 153 S. E. 58.

[45]Glasgow v. Rowse, (1869) 43 Mo. 479; Ludlow-Saylor Wire Co. v. Wollbrink, (1918) 275 Mo. 339, 205 S. W. 196.

[46](1918) 275 Mo. 339, 205 S. W. 196.

A leading authority to the effect that an income tax is not a property tax in any sense, is the decision of the supreme court of Mississippi in *Hattiesburg Grocery Co. v. Robertson*,[47] holding that an income tax can be levied in disregard of the limitations imposed by the state constitution with regard to property taxes. The court said:

> "While a tax on income includes some of the elements both of a tax on property and of a tax on persons, it cannot be classified as strictly a tax on either, for it is generically and necessarily an excise."[48]

A similar conclusion was reached after much controversy by the supreme court of Arkansas in *Sims v. Ahrens*.[49] Here the majority thought on the original hearing that the legislature could not impose any state income tax at all, since that would involve the taxation of occupations "of common right," which had been held to be contrary to the state constitution. On rehearing there was a sufficient changing of judicial minds so that the majority of the court now thought that there was no objection to the income tax, on the ground that occupations are not taxed at all by it. It is pointed out that the carrying on of an occupation may not result in any income being received, so that an income tax is not on the occupation. What is taxed is not made clear, but the court is very sure that an income tax is an excise. The court has reiterated this doctrine as to the nature of the income tax in two more recent cases.[50]

Apart from these considerations of existing authorities and of the arguments which they adduce, there are

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[47](1921) 126 Miss. 34, 88 So. 4.
[48](1921) 126 Miss. 34, 52, 88 So. 5.
[49](1925) 167 Ark. 557, 271 S. W. 720.
[50]Stanley v. Gates, (1929) 179 Ark. 886, 19 S. W. (2d) 1000; Baker v. Hill, (1929) 180 Ark. 387, 21 S. W. (2d) 867.

other considerations which seem to show that this conception of the income tax as a property tax on the income itself cannot be sustained. There is, in the first place, the sharp distinction which is made between capital and income.[51] If the thing upon which a purported income tax is attempted to be collected is regarded by the court as capital rather than income, the tax is, of course, invalidated.[52] But it seems clear that capital is even more clearly property than is income. If, therefore, a property tax is to be levied upon income, it should a fortiori be levied upon capital.

Also, as has been pointed out, a taxation of income as property involves double taxation because part of the income is practically certain to be invested in other property itself subject to taxation. Indeed, any retroactive federal income tax is practically, even if not theoretically, objectionable, as involving an unapportioned direct tax upon the property in which the income has been invested, the income itself having disappeared.[53] Such limited retroactivity as is necessary for the efficient collection of the tax, cannot, however, reasonably be objected to.[54]

Even more decisive, and equally applicable to both of these alternative theories of the income tax as a property tax, is the almost unanimous rule that a covenant to pay taxes in general will not be applied to income taxes.[55] If the covenant is intended to include in-

[51]Towne v. Eisner, (1918) 245 U. S. 418, 38 Sup. Ct. 158, 62 L. Ed. 372; Eisner v. Macomber, (1920) 252 U. S. 189, 40 Sup. Ct. 189, 64 L. Ed. 521; Merchants' L. & T. Co. v. Smietanka, (1921) 255 U. S. 509, 41 Sup. Ct. 386, 65 L. Ed. 751; Cooper v. United States, (1930) 280 U. S. 409, 50 Sup. Ct. 164, 74 L. Ed. 516. See also Commonwealth v. Brown, (1895) 91 Va. 762, 21 S. E. 357.

[52]Drexel v. Commonwealth, (1863) 46 Pa. St. 31; Miles v. Safe Deposit Co., (1922) 259 U. S. 247, 42 Sup. Ct. 483, 66 L. Ed. 923. Cf. Taft v. Bowers, (1929) 278 U. S. 470, 49 Sup. Ct. 199, 73 L. Ed. 460.

[53]See Smith, Retroactive Income Taxation, (1923) 33 Yale L. J. 35.

[54]See Smith, Retroactive Income Taxation, (1923) 33 Yale L. J. 35.

[55]4 Cooley, Taxation, 4th ed., sec. 1761.

come taxes, they must be quite definitely mentioned or at least referred to. Thus a covenant by a lessee to pay taxes upon the leased property will not be construed to include income taxes payable by the lessor upon the rent received.[56] Even Massachusetts accepts this doctrine,[57] although it is logically inconsistent with the accepted theory in that state that income taxes are taxes upon the property from which the income is derived. And it has further been held that a tax-free covenant in a bond does not make the obligor liable to pay the income tax incurred by the bondholder with respect to the interest, and this notwithstanding the fact that the income tax is collected at the source and so is withheld by the obligor.[58] It must follow that the tax is not regarded as imposed upon the interest as property. There may be, of course, in either case an explicit covenant to pay the income tax, but if that tax is really on the property the general covenant would cover it.

Finally, *Cook v. Tait*[59] is a decisive authority that an income tax is not a property tax. Here the taxpayer had no property in the United States, and all his income was derived from sources outside this country. There was, therefore, no property for the United States to tax, and if the income tax is a property tax, no such tax could have been exacted.[60] It must

[56]Young v. Ill. Athletic Club, (1923) 310 Ill. 75, 141 N. E. 369; Atlantic, etc., Ry. Co. v. Southern Ry. Co., (1928) 149 Va. 701, 141 S. E. 770; Missouri Athletic Ass'n v. Delk Inv. Corp., (1929) 323 Mo. 765, 20 S. W. (2d) 51.

[57]Stony Brook R. Corp. v. Boston, etc., R. Co., (1927) 260 Mass. 379, 157 N. E. 607 However the income tax here involved was not the state but the federal; and the Massachusetts court has admitted that the federal income tax may be on a different basis from its own.

[58]Urquhart v. Marion Hotel Co., (1917) 128 Ark. 283, 194 S. W. 1.

[59](1924) 265 U. S. 47, 44 Sup. Ct. 444, 68 L. Ed. 895.

[60]Lawrence v. State Tax Commission, (1932) 286 U. S. 276, 52 Sup. Ct. 556, supra, note 31, holding that a state may impose a tax upon residents with respect to their entire income, including that derived from sources outside the state, is also a decisive authority that an income tax is not a property tax, for, as has been shown, such residents could not be taxed upon or with reference to such property.

nically an income tax, but rather an excise upon the right to do business as a corporation. When the income of an individual is taxed, we have technically as well as substantially an income tax, and there is no special privilege on which to base an excise.

Nevertheless, there is good authority as well as reason for holding that an individual income tax is also an excise. Many of the cases already cited as holding that an income tax is not a property tax (especially those rejecting the conception that it is upon the income itself as property) explicitly decide that it is an excise tax;[71] and most of the other decisions in this category encourage an inference to the same effect.[72] Neither is the objection decisive that income taxation is somewhat retroactive in effect, for excise taxes of at least equally retroactive operation have been sustained as against attacks under the federal constitution.[73] And finally, *Springer v. United States*,[74] which has never been overruled though it has been very much limited in effect, sustained the power of the federal government to levy a general income tax, upon the ground that it is in its nature an excise tax.

So far the excise tax theory is unassailable. But *Pollock v. Farmers' Loan & Trust Co.*[75] interposes what is submitted to be an insuperable objection to this theory. The argument of the government in that case was based upon the proposition that an income tax is an excise; and the dissenting opinions urge the same

[71] See especially the cases cited in notes 47-50.
[72] See State v. Gulf etc. R. Co., (1925) 138 Miss. 70, 104 So. 639.
[73] Billings v. United States, (1914) 232 U. S. 261, 34 Sup. Ct. 421, 58 L. Ed. 596. See also United States v. Goelet, (1914) 232 U. S. 293, 34 Sup. Ct. 431, 58 L. Ed. 610, and United States v. Bennett, (1914) 232 U. S. 299, 34 Sup. Ct. 433, 58 L. Ed. 612.
[74] (1880) 102 U. S. 586, 26 L. Ed. 253.
[75] Supra, notes 17 and 18.

theory. Indeed, it does not seem to have been disputed that the federal government has full powers to impose excise taxes, without any limitation, save those applying to all forms of taxation. Such a proposition could hardly have been seriously disputed in 1895, when that case was decided and even less now. But the Court decided that the tax was objectionable as a direct tax upon property, and this necessarily involves the holding that it is not an excise tax. So long as the *Pollock Case* stands, the theory of the income tax as one of the classes of excise taxes cannot be regarded as adequate.

Furthermore—though it must be confessed that this is not so conclusive an argument—there is considerable tendency in judicial thinking to make a sharp distinction between ordinary excise taxes and income taxes. The latter are regarded as belonging in a quite different class from the former. Thus, in *Ould v. Richmond*,[76] the Virginia supreme court decided that a tax upon lawyers was an excise *and not* an income tax, although, because of the division of taxpayers into different classes for computing the amount of the tax, such amount depended very largely upon their respective incomes. Even more emphatic is the decision of the same court in *Commonwealth v. Werth*,[77] that a lawyer who has paid the excise tax must also pay the income tax, the court explicitly pointing out the importance of sharply distinguishing these two classes of taxes. The same distinction has been made by the federal courts between the corporation excise tax of 1909, and the subsequent general income taxes,[78] though, as has

[76](1873) 23 Gratt. (Va.) 464.
[77](1914) 116 Va. 604, 82 S. E. 695.
[78]United States v. Philadelphia etc. R. Co., (D.C. Pa. 1920) 262 Fed. 188; Cadwalader v. Lederer, (D.C. Pa. 1921) 273 Fed. 879.

been shown,[79] the computation of these taxes, so far as they have the same scope, is precisely the same.

It has been contended that a general income tax, as distinguished from one limited to the income from property, is still to be regarded as an excise tax. Thus it has been said:

> "It is probably now generally conceded that a tax laid directly on the income of property is a tax on the property itself . . . although a tax on the income from a trade, profession or employment is undoubtedly an excise; and a tax on income from all sources is also probably an excise, although it includes income from property, since in such a case a special burden is not put upon property by virtue of the ownership thereof."[80]

There are three propositions as to the nature of the income tax laid down in the above quotation. The first of these is justified by the decision in *Pollock v. Farmers' Loan & Trust Co.*[81] The second is probably supported by *Springer v. United States.*[82] But the third proposition, that a general income tax is an excise, is in direct contravention of the decision in the *Pollock Case*, and cannot, therefore, be supported.

Conclusion

It is believed that it has been demonstrated that, while the income tax in its usual general form bears strong analogies to each of the three accepted categories into which all taxes are usually divided, yet it cannot be fitted into any one of them. It is not a per-

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[79] Supra, page 129.
[80] Taxation, 26 R. C. L. 142.
[81] Supra, notes 17 and 18.
[82] (1880) 102 U. S. 586, 26 L. Ed. 253.

sonal tax, because it does not fulfill the requirement of uniformity, and even more clearly because it can be imposed without personal jurisdiction. It cannot be supported as a property tax on either theory by which this classification has been attempted. To treat it as a tax upon the property from which the income is derived ignores the fact that much income is not derived from any property, and yet is taxable and actually taxed. It cannot be treated as a tax upon the income itself as property, because property cannot properly be taxed upon the basis of duration of time, which is the only practical and is the universal, manner of taxing income. And finally, though in theory there is much justification for treating it as an excise tax, and an excise tax, if otherwise justified, may be measured by the income of the taxpayer, yet the authority of the Supreme Court of the United States forbids the inclusion of the general income tax in the class of excise taxes.

Under these conditions it would seem that the position of the counsel for New York state in their argument before the federal Supreme Court in *Travis v. Yale & Towne Co.*,[83] is correct. They maintained that the income tax is "composite" in nature. But if this is sound, and the income tax is a composite of the three usual classifications of taxes, it is apparent that the income tax is in a class by itself. The courts of Georgia and Missouri had entirely the right idea when they decided long ago that the income tax must be put into a separate category,[84] although their enumeration of the various classes of taxes was incomplete.

[83](1920) 252 U. S. 60, 40 Sup. Ct. 228, 64 L. Ed. 460. The argument referred to in the text is summarized in 252 U. S. 61 ff.
[84]See cases cited in note 3, supra.

Wisconsin, at least, has recognized that the income tax is *sui generis*. In the leading case of *State v. Frear*,[85] the court of that state, speaking through Chief Justice Winslow, said:

> "However philosophical the argument may be that taxation of rents received from property is in effect taxation of the property itself, the people of Wisconsin have said that 'property' means one thing, and 'income' means another; in other words that income taxation is not property taxation, as the words are used in the constitution of Wisconsin."[86]

This quotation not only rejects the theory of the *Pollock Case* that the income tax is a property tax, but it emphatically insists that income taxation is in a class by itself. The court has always adhered to this view. In *State v. Johnson*,[87] it said:

> "We have in this state two independent systems of taxation, namely, property tax and income tax, and, while the uniformity clause of the constitution applies to property tax, it has no application to income tax."[88]

Some other courts, though less clearly, have recognized that the income tax cannot be put into any accepted category, but stands alone. Thus the supreme court of South Carolina has stated that it is "primarily a subjective tax imposing personal liability upon the recipient of the income,"[89] though it is clear from the context and from the actual decision that the court was not urging that this tax is to be regarded as merely a

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[85](1913) 148 Wis. 456, 134 N. W. 673. See also State v. Tax Commission, (1915) 161 Wis. 111, 153 N. W. 848.
[86](1912) 148 Wis. 456, 507, 134 N. W. 673, 689.
[87](1919) 170 Wis. 218, 175 N. W. 589.
[88](1919) 170 Wis. 218, 242, 175 N. W. 589, 599. Cf. Norris v. Wisconsin Tax Comm., (1931) 205 Wis. 626, 238 N. W. 415.
[89]Crescent Mfg. Co. v. Tax Commission, (1924) 129 S. C. 480, 485, 124 S. E. 761, 762.

personal tax. And the supreme court of North Carolina uses the following suggestive language:

> "But the tax levied on income is not a property tax, but is a percentage laid on the amount which a man receives, irrespective of whether he spends it, wastes it, or invests it."[90]

Similar language will be found in decisions of the New York courts[91] and of the federal courts.[92] There is thus a growing though as yet by no means clear, recognition of the unique nature of the income tax.

It may be urged that the states have, after all, the sole power to determine the method and basis of their own taxes; that therefore, whatever they determine the nature of their income taxes to be, will be binding.[93] Within limits this is true; though it is quite unfortunate to find some states struggling under fatal judicial handicaps to the imposition of a proper and scientific income tax, simply because the courts of that state have mistakenly decided that it is some other kind of a tax, and subject to the limitations applying to that other form of taxation.[94] Such limitations are almost always sufficient to prevent the use of the peculiar characteristics of the income tax which are its chief virtues. Furthermore, the states cannot conclusively determine the nature of their own forms of taxation when other taxing jurisdictions are concerned. So the ultimate nature of the income tax is of tremendous importance when the problem arises of apportioning taxable

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[90] Purnell v. Page, (1903) 133 N. C. 125, 129, 45 S. E. 534, 535.

[91] People v. State Tax Commission, (1926) 218 App. Div. 1, 217 N. Y. S. 669.

[92] Pa. Cement Co. v. Bradley Const. Co., (1920) (D.C. N.Y.) 274 Fed. 1003, 1006, where the court said "An income tax is not upon any specific sum of money, but is a personal tax, measured by sums of money received [or possibly accrued] to the person taxed during a certain period."

[93] See Maguire v. Trefry, (1920) 253 U. S. 12, 40 Sup. Ct. 417, 64 L. Ed. 739.

[94] See the authorities cited in note 30, supra.

income between two or more states,[95] and when there is a question of state income taxes burdening federal functions, or vice versa. And obviously this is not a question which the state courts can finally decide; ultimately the problem is a constitutional one for the federal courts.

Undoubtedly there are analogies which will be helpful in the solution of all these problems. There are some slight analogies between the income tax and purely personal taxes; much stronger analogies between it and property taxes; and the strongest analogies of all between income and excise taxes. All of these analogies will help in the solution of the unsettled practical problems as to the application of, and limitations on, income taxes; but it is important to remember that they are merely analogies, and useful only as such. The analogies should never be allowed to bind us to the real nature of the income tax, nor to cause us to forget that these practical problems must be solved in the light of that nature. The fundamental nature of the income tax is in short that it is an income tax and nothing else.

[95] See Rottschaefer, State Jurisdiction of Income for Tax Purposes, (1931) 44 Harv. L. Rev. 1075.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

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Appellant,

vs.

MARK GRAVES, JOHN J. MERRILL and JOHN P. HENNESSEY, as Commissioners constituting the State Tax Commission of the State of New York,

Appellees.

MOTION OF EDGAR M. LEVENTRITT FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*, AND BRIEF OF *AMICUS CURIAE*.

EDGAR M. LEVENTRITT,
Trustee for J. M. Joseph Trust,
Amicus Curiae.

EDGAR M. LEVENTRITT,
WM. R. GREEN, JR.,
J. MARK JACOBSON,
FRANK ALLAND,
of Counsel.

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Appellees.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT.

May It Please The Court:

The undersigned, trustee under the Deed of J. M. Joseph, having secured the consent of counsel for the appellant and the Attorney General of the State of New York, respectfully moves this honorable Court for leave to file the accompanying brief in this case as *amicus curiae* in support of the appellant's position.

The special reasons for this motion are as follows:

The undersigned is trustee of the J. M. Joseph Trust, which owns real estate in the City of Birmingham, State of Alabama, the net rents and income of which are distributable to an adult beneficiary, a resident of the State of New York, of which State the trustee is also a resident. As rents from real estate in Alabama are subject to income tax there, such rents would be subject to double taxation if the law here under review be upheld.

EDGAR M. LEVENTRITT,
Trustee of J. M. Joseph Trust,
as *Amicus Curiae*.

EDGAR M. LEVENTRITT,
WM. R. GREEN, JR.,
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BRIEF OF *AMICUS CURIAE.*

I.

Object of Brief.

The purpose of this brief is to support as *amicus curiae* the appeal of the appellant herein from the final order of the New York Court of Appeals, entered upon its decision reported in 271 N. Y. 353, sustaining the constitutionality, under the Fourteenth Amendment of the Constitution of the United States, of Section 359 of the New York Tax Law (Cons. Laws, Ch. 60, as amended by Laws of 1935, Ch. 933, Sec. 1), in so far as it imposes an income tax upon rents from real property in a foreign State received by a resident of New York.

Income of the J. M. Joseph Trust is derived from rents of Alabama real property and accordingly this brief does not discuss the second issue, raised by the appellant herein, of the constitutional right of New York to tax income derived from foreign mortgages.

II.

Argument.

Summary of Argument.

The trend of recent tax decisions of this Court emphasizes the jurisdictional dangers of multiple taxation. To avert these evils, it has limited the taxing power of domiciliary states and has based tax jurisdiction upon the principle of the situs of property. This trend should be continued and applied to domiciliary income taxation of rents from realty located in another state.

Within the rule that a State may not tax lands situated beyond its borders, no logical differentiation exists between a tax on land and a tax on the rents therefrom. In analogous situations, this Court has held that a tax upon the income from exempt property amounts to a tax upon the principal itself.

The decisions of this Court do not preclude a holding that New York is powerless to tax the income of a New York resident derived from rents of land situated in another state. Any analogy to the power of the Federal Government to tax income from property owned by American citizens abroad is utterly fallacious. And the decisions of this Court sustaining domiciliary taxation of income of residents derived from securities without taxable situs elsewhere or from personal activities elsewhere are not determinative of the right of the domiciliary state to tax the income of residents derived from rents from realty in another state.

POINT A.

The trend of recent tax decisions of this Court emphasizes the jurisdictional dangers of double taxation; limits the taxing powers of domiciliary States; and grounds tax jurisdiction upon the principle of the situs of property. This trend should be applied to domiciliary income taxation of rents from realty in another State.

The recent decisions of this Court disclose a definite tendency to draw away from theoretical conceptions respecting situs of property for taxation purposes which have the

anomalous and unjust results of localizing property in more than one place at one time. In *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 212, and *First National Bank* v. *Maine,* 284 U. S. 312, 325, this Court enunciated the sound proposition that "taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, as far as possible, unjust and oppressive consequences." We submit that this same practical point of view should be applied in the testing of State income tax laws.

During the past few years this Court has clearly and repeatedly construed the due process clause of the Fourteenth Amendment to avoid the patent evils of double taxation. In *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, 93, it held that the domiciliary State of the *cestui que trust* of an estate consisting of intangible property with situs in another State had no power to tax the *cestui* upon his interest therein. The adoption of a contrary rule, it was declared, would "involve possibilities of an extremely serious character by permitting double taxation, both unjust and oppressive."

In *Farmers Loan & Trust Co.* v. *Minnesota, supra,* in denying to Minnesota the right to levy an inheritance tax on Minnesota public securities owned by a New York decedent and held by him at his domicile, the Court grounded its holding upon its legal aversion to double taxation. It is not permissible under the Fourteenth Amendment, the Court emphasized, for two States to have power to tax the same personalty on different and inconsistent principles.

> "And, we think, the general reasons declared sufficient to inhibit taxation of them [tangibles] by two States apply under present circumstances with no less force to intangibles with taxable situs imposed by due application of the legal fiction [*mobilia sequuntur personam*]. Primitive conditions have passed; business is now transacted on a national scale. A very large part of the country's wealth is invested in negotiable securities whose protection against discrimination, unjust and oppressive taxation, is matter of the greatest moment."
>
> *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204, 211-212.

So determined was this Tribunal to destroy the evils of multiple taxation and to settle the jurisdictional limits of the States' taxing powers that in the above case it went to the length of specifically reversing *Blackstone* v. *Miller*, 188 U. S. 189, which previously lent support to the doctrine that choses in action were subject to taxation at both the debtor's and the creditor's domicile, and that two States might tax, on different and inconsistent principles, the same testamentary transfer of such property. That view, the Court held (p. 209), inevitably disturbed "good relations among the States" and produced "the kind of discontent expected to subside after the establishment of the Union." This view was reiterated in *First National Bank* v. *Maine*, 284 U. S. 312, 324.

The Court further stated (p. 326):

> "*The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property, is broader than the applications thus far made of it.* In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time. In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self-contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may

> be, at the same moment, within the taxable jurisdiction of as many as four states. * * * A transfer from the dead to the living of any specific property is an event single in character and is effected under the laws, and occurs within the limits, of a particular state; and it is unreasonable, and incompatible with a sound construction of the due process clause of the Fourteenth Amendment, to hold that jurisdiction to tax that event may be distributed among a number of states." (Italics ours.)

This opposition to multiple taxation and this construction of the Fourteenth Amendment to avoid the legal possibility of such taxation were reiterated in *City Bank Farmers' Trust Co.* v. *Schnader*, 293 U. S. 112.

The considerations that influenced the Court in those cases to enunciate a rule preventing multiple inheritance taxes on a single succession to property, despite the fact that such taxes operate but once, all the more justify a rule preventing multiple income taxation, which levies an annually recurring charge. Receipt of annual income from any specific parcel of realty is an event single in character. If it is unreasonable and incompatible with a sound construction of the due process clause of the Fourteenth Amendment to hold that the jurisdiction to tax a decedent transfer may be distributed among a number of States, logical consistency requires that the single act of receiving annual income from realty should not be subjected to conflicting State taxing jurisdictions.

To avoid the dangers of multiple taxation, this Court has limited the taxing jurisdiction of domiciliary States. It is well established that, neither for *ad valorem* property nor decedent estates taxes, does the domiciliary State have jurisdiction to tax a resident on the land or any interest in land situated in another State.

> *Senior* v. *Braden*, 295 U. S. 422.

Similarly, the domiciliary State may not tax a resident on tangible personalty which has acquired an actual situs elsewhere.

> *Wheeling Steel Corp.* v. *Fox*, 298 U. S. 193.
> *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18.
> *Frick* v. *Pennsylvania*, 268 U. S. 473.
> *City Bank Farmers' Trust Co.* v. *Schnader*, *supra*.

And where intangible property has acquired an actual situs elsewhere, the domiciliary State has no taxing jurisdiction. In *Safe Deposit & Trust Co.* v. *Virginia,* 280 U. S. 83, a Virginia resident transferred a fund of stocks and bonds to a Maryland trust company in trust for his children; the trustee was empowered to change the investments and to accumulate the income; the donor reserved a power of revocation but died without exercising it. This Court held that a tax by Virginia, the domiciliary State, upon the trust estate held by the Maryland trustee was invalid as a tax on property beyond the jurisdiction of Virginia.

In so delimiting the taxing power of the domiciliary State, this Court has clearly recognized that the doctrine of *mobilia sequuntur personam* is merely a legal fiction and, as such, must yield to the established fact of the actual presence and control elsewhere of property, tangible or intangible, and ought not to be applied where to do so would result in the injustice of double taxation.

> "The old rule expressed in the maxim *mobilia sequuntur personam,* by which personal property was regarded as subject to the law of the owner's domicil, grew up in the Middle Ages, when movable property consisted chiefly of gold and jewels, which could be easily carried by the owner from place to place, or secreted in spots known only to himself. In modern times, since the great increase in amount and variety of personal property, not immediately connected with the person of the owner, that rule has yielded more and more to the lex situs, the law of the place where the property is kept and used."
>
> *Pullman's Car Co.* v. *Pennsylvania,* 141 U. S. 18, 22.

Wheeling Steel Corp. v. *Fox,* 298 U. S. 193.
Safe Deposit & Trust Co. v. *Virginia, supra.*
Frick v. *Pennsylvania,* 268 U. S. 473, 493.
State Board of Assessors v. *Comptoir National d'Escompte,* 191 U. S. 388, 404.
Buck v. *Beach,* 206 U. S. 392, 408.

To avert the evils of multiple taxation, this Court has furthermore clearly and repeatedly grounded State tax juris-

diction upon the principle of the situs of property. That State wherein property—realty, tangibles or intangibles—is integrated in the economic life of the community has the sole and exclusive jurisdiction to levy an *ad valorem* or inheritance tax directly upon or measured by that property.

In *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, this Court held invalid a Kentucky tax of a Kentucky corporation upon tangible personalty permanently located and employed elsewhere in the prosecution of its business. In reaching this decision, the Court held that the protection Kentucky afforded to the taxpayer domiciled there was not ground for taxing his property that had a situs beyond its borders. This proposition has been reiterated time and again.

Wheeling Steel Corp. v. *Fox*, 298 U. S. 193.
Railroad Co. v. *Jackson*, 7 Wall. 262.
State Tax on Foreign-Held Bonds, 15 Wall. 300.
Tappen v. *Merchants' National Bank*, 19 Wall. 490, 499.
Delaware, L., etc., R. R. Co. v. *Pennsylvania*, 198 U. S. 341, 358.

Similarly, if an individual keeps his intangibles—securities, accounts receivable, bank accounts—in a State other than his domicile and if they are integrated with its economic life there, then such State has exclusive tax jurisdiction.

Wheeling Steel Corp. v. *Fox*, 298 U. S. 193.
Safe Deposit & Trust Co. v. *Virginia*, 280 U. S. 83.
State Tax on Foreign-Held Bonds, 15 Wall. 300.
New Orleans v. *Stempel*, 175 U. S. 309.
Bristol v. *Washington County*, 177 U. S. 133.
State Board of Assessors v. *Comptoir National d'Escompte*, 191 U. S. 388.
Metropolitan Life Ins. Co. v. *New Orleans*, 205 U. S. 395.
Liverpool & L. & G. Ins. Co. v. *Orleans Assessors*, 221 U. S. 346.

In inheritance tax cases, the Court has likewise declared that the right to transmit property at death is so intimate an element of the property right that a State cannot constitutionally burden it by a tax unless the physical property itself has a situs there.

Frick v. *Pennsylvania*, 268 U. S. 473.
City Bank Farmers' Trust Co. v. *Schnader*, 293 U. S. 112.

In *Farmers' Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 213, the Court, citing its decisions on *ad valorem* property taxes, recognized the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business. This proposition was reiterated in *First National Bank* v. *Maine*, 284 U. S. 312, 331. In both these cases, however, the record indicated that the intangibles therein were economically integrated at their owners' domicile; and consequently the Court was not there called upon to delimit the jurisdiction of the domiciliary State over death taxes on intangibles.

In the case of income taxes, too, this Court has rested jurisdiction upon the principle of situs. It argued, in effect, that the principles applicable to other types of taxation are applicable to income taxes. If the source of the income is closely related to the economic life of a State, then *that* State has jurisdiction to tax the income.

Thus, in *Shaffer* v. *Carter*, 252 U. S. 37, the Court sustained an income tax by Oklahoma upon the net income derived by a non-resident from oil wells owned and operated by him within that State. The language that this Court employed in the *Shaffer* case to sustain an income tax by the *non-domiciliary State*, we submit, is highly significant in determining that the *domiciliary State* cannot levy a second tax on the income derived from property that has an undisputed situs elsewhere. The Court said (p. 50):

> "In well-ordered society, property has value chiefly for what it is capable of producing, and the activities of mankind are devoted largely to making recurrent

> gains from the use and development of property, from tillage, mining, manufacture, from the employment of human skill and labor, or from a combination of some of these. * * * That the State, from whose laws property and business and industry derive the protection and security without which production and gainful occupation would be impossible, is debarred from exacting a share of those gains in the form of income taxes for the support of the government, is a proposition so wholly inconsistent with fundamental principles as to be refuted by its mere statement. That it may tax the land but not the crop, the tree but not the fruit, the mine or well but not the product, the business but not the profit derived from it, is wholly inadmissible."

In the light of the *Shaffer* case, there can be no doubt but that New Jersey can constitutionally tax the identically same income from rents that New York is here attempting to tax. New York to-day collects an income tax upon the rents received by non-residents from New York realty (Sec. 351, N. Y. Tax Law).

If the economic and legal relationship between the domiciliary State and the property roots of a taxpayer's income cannot be established, then clearly the *sine qua non* of tax jurisdiction is absent and the tax is a deprivation of property without due process of law. To apply the language employed in the *Shaffer* case, where a State cannot tax the mine or the well, how can it tax the product; where it cannot tax the tree, how can it tax its fruit; where it cannot tax the land, how can it tax the crop?

When we examine income taxation realistically, it appears that jurisdiction to tax income does not differ materially from jurisdiction for purposes of other taxes. The State levies an *ad valorem* real property tax in return for the opportunities afforded by the possession of property; it levies an inheritance tax on land in return for the privilege of transmitting that property through death; and it levies an income tax on rents in return for the opportunities realized through the use of that property. The ultimate source of taxation—the land—is the same. In the case of the first two

taxes, this Court has clearly and repeatedly declared that, regardless of the nomenclature applied to the tax, only that State within which the property has its situs has the right to tax the land or any of its legal or economic incidents. Inasmuch as the sole source of the taxpayer's income from rents is his land, the same considerations and the same emphasis on situs, demonstrated in *ad valorem* and inheritance tax cases, should be adopted in respect to a tax upon the fruits of land. We submit that this Court should apply to domiciliary State income taxation of rents from foreign realty the same practical approach and jurisdictional arguments on which it has disallowed domiciliary State taxation of tangible and intangible property that has acquired a situs beyond its borders.

POINT B.

No logical differentiation, within the rule that a State may not tax lands situated beyond its borders, exists between a tax on land and a tax on the rents thereof.

Land and the rents therefrom are inherently so closely related to each other that whenever the question has arisen all courts, including New York and New Jersey, the jurisdictions here involved, have given to both the same legal incidents and attributes.

Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429.
United States v. *Noble*, 237 U. S. 74.
Green v. *Biddle*, 8 Wheat. 1.
Brown v. *Brown*, 33 N. J. Eq. 650.
Den ex dem. Farley v. *Craig*, 15 N. J. L. 190.
Van Wicklen v. *Paulson*, 14 Barb. (N. Y.) 654.
Marshall v. *Moseley*, 21 N. Y. 280.
State v. *Royal Mineral Ass'n.*, 132 Minn. 232.
Scully v. *People*, 104 Ill. 349.
Doe dem. Goldin v. *Lakeman*, 2 Barn. & Ad. 30.
Oahu Ry. & Land Co. v. *Pratt*, 14 Haw. 126.

This Court as early as 1823, in the case of *Green* v. *Biddle*, 8 Wheat. 1, 76, said:

> "A right to land essentially implies a right to the profits accruing from it, since without the latter, the former can be of no value. Thus a devise of the profits of land, or even a grant of them, will pass a right to the land itself. Shep. Touch. 93, Co. Litt. 4. b. 'For what,' says Lord Coke, in this page, 'is the land, but the profits thereof?' "

In the case of *United States* v. *Noble, supra,* this Court held that an assignment of the rents and royalties from real estate was an alienation of the land itself within the meaning of a congressional enactment forbidding Indians from alienating certain lands.

In the case of *Marshall* v. *Moseley*, 21 N. Y. at 286, the Court said:

> "It may be well to observe that rents are unlike annuities, and unlike the interest of money; they issue out of land, and are a part of the land; * * * "

In *Brown* v. *Brown*, 33 N. J. Eq. 650, it was held that the conveyance by a beneficiary under a will of his right to receive rents from lands was a conveyance of an interest in land within the Statute of Frauds.

These varied decisions are presented solely to demonstrate beyond cavil that common-law courts everywhere have recognized and applied the inherent relationship of rent and land.

This legal conclusion, to a large degree, is an outgrowth of the recognition by practical economists that land apart from its income can have no value, that real estate value and rents are inseparable. Leading authorities in the field of real estate appraisal state in the broadest terms that the only sound method of determining the value of land is the capitalization of its rent or income.

Richard T. Ely states:

> "The valuation of land implies the making of an estimate of the expected net income from the use of land over a period of years. In England the value of land is often expressed as 'twenty or twenty-five years purchase' of an annual income. In the United States the expected series of annual incomes is summarized in one figure which represents the present value of the succession of incomes and is called the capital value or selling value of the land. This process of capitalizing land income into capital value is considered the heart of the problem of land valuation."
>
> *Economic Essays in Honor of John Bates Clark* (1927), at p. 130.

For identical views see Frederick M. Babcock, *Valuation of Real Estate* (1932), p. 129; Philip W. Kniskern, *Real Estate Appraisal and Valuation* (1933), p. 241.

This Court, in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, in considering the nature of income taxes, has similarly recognized how intrinsically the same are land and its rents. The question there considered was whether a tax on rents was a direct tax within the meaning of the Federal Constitution requiring all direct taxes to be apportioned and the Court unequivocally held that it was a direct tax. The Court, in reaching this conclusion, stated, at page 580:

> "The requirement of the Constitution is that no direct tax shall be laid otherwise than by apportionment—the prohibition is not against direct taxes on land, from which the implication is sought to be drawn that indirect taxes on land would be constitutional, but it is against all direct taxes—and it is admitted that a tax on real estate is a direct tax. Unless, therefore, a tax upon rents or income issuing out of lands is intrinsically so different from a tax on the land itself that it belongs to a wholly different class of taxes, such taxes must be regarded as falling within the same category as a tax on real estate *eo nomine*. The name of the tax is unimportant. The real question is, is there any basis upon which to rest the contention that real estate belongs to one of the two great

> classes of taxes, and the rent or income which is the incident of its ownership belongs to the other? We are unable to perceive any ground for the alleged distinction. *An annual tax upon the annual value or annual user of real estate appears to us the same in substance as an annual tax on the real estate, which would be paid out of the rent or income.* This law taxes the income received from land and the growth or produce of the land. Mr. Justice Paterson observed in *Hylton's case,* 'land, independently of its produce, is of no value'; and certainly had no thought that direct taxes were confined to unproductive land." (Italics ours.)

Whether we consider the *Pollock* case as holding that a tax on rents is a tax on the land or not, the conclusion is irresistible that this Court there considered the land and the rents therefrom to be inseparable for tax purposes.

This interpretation of the *Pollock* case has been followed by the State courts in passing upon the right of a domiciliary State to levy taxes on income derived from foreign realty. The New Hampshire Court instructed the Legislature of that State that it could not under the Federal Constitution enact the same statutory provision involved in the instant case. In *Opinion of the Justices,* 84 N. H. 559, 573, it argued that due process of law requires the localization of income for State income tax purposes, and that, since a State cannot tax realty located beyond its borders and since a tax on rent is under the *Pollock* rule a tax on the realty from which derived, a State has no jurisdiction to impose an income tax on the rent from such realty when received by its residents. See also *Opinion of the Justices,* 220 Mass. 613, 624.

In *Matter of Pierson* v. *Lynch,* 237 App. Div. 763, aff'd without opinion 263 N. Y. 533, writ of certiorari dismissed as improvidently granted, 293 U. S. 52, a New York statute similar to the one here under consideration was declared unconstitutional on the basis of the *Pollock* case and the judicial construction of the due process clause of the Fourteenth Amendment. The few differences in fact between that case and the instant litigation are minute and insignificant. In the *Pierson* case title to the realty was in the

recipient of the income, whereas here the recipient of the income has only a life interest in the property. This slight difference obviously cannot be urged as a ground for the differentiation of the cases, since the question there involved the same broad issue of whether an income tax is such a tax as may be imposed by one State upon rents from real property located in another State. The fact that the New York statute has since the *Pierson* decision been amended to include specifically income derived from foreign rents is without significance, as that case was decided solely upon the ground that under the Fourteenth Amendment it was not within the power of New York to tax a New York resident on rentals or income received from land located beyond its borders.

This Court on the reargument of the *Pollock* case, 158 U. S. 601, 628, refused to refine away constitutional restrictions "by forced distinctions between that which gives value to property, and the property itself." We say here that the identical forced distinctions should not be used to refine away the salutary rule enunciated by this Court that one State cannot tax lands lying in another State. We believe the argument to be unanswerable that if New York can, under the guise of an income tax law, tax the rent from lands lying in New Jersey, then that rule has, as a practical matter, been evaded and abrogated.

The New York income tax return required to be filed by all taxpayers clearly and cogently demonstrates that the tax is, in effect, a tax on foreign lands. The taxpayer must list and swear to each parcel of realty he owns and his income from each separately. In computing his net income from rents, he is required to state for each parcel the gross rents collected and his deductions therefrom for repairs, depreciation, depletion, interest, taxes and other expenses (N. Y. Tax Law, Sec. 371, Regulations Art. 522). The very face of the return thus belies the argument that the income of the taxpayer derived from foreign rents is so commingled with his other income as to destroy all reference to its immediate roots in foreign lands.

This Court in the case of *Senior* v. *Braden*, 295 U. S. 422, has already expressed its disapproval of indirect taxation of

lands owned by a resident in a foreign jurisdiction. An Ohio statute taxing investments held by residents provided that in listing investments, "the amount of the income yield of each for the calendar year next preceding that date of listing shall * * * be stated in dollars and cents and the assessment thereof shall be at the amount of such income yield." The tax amounted to 5% of the income yield. The taxpayer, a resident of Ohio, owned land certificates representing foreign real estate under which he was entitled to receive a fixed portion of the rents. This Court determined that the statute taxed an interest in foreign land, and was therefore unconstitutional. The certificates owned by the taxpayer were more than mere intangibles; they were rather "interests in land," and as such, under well-recognized principles, the State of Ohio had no jurisdiction to tax them. In reaching this conclusion, the Court said (p. 429):

> "The validity of the tax under the Federal Constitution is challenged. Accordingly we must ascertain for ourselves upon what it was laid. Our concern is with realities, not nomenclature."

We submit that no essential difference exists between a tax on land reckoned upon its income and a tax on the income from the land as to warrant holding the first unconstitutional and the second a valid exercise of the taxing power. Since the primary purpose of owning land is to secure income therefrom, since a State cannot validly tax land beyond its borders, and since a high tax on incomes derived from foreign lands seriously impairs the value of the land, New York's attempt to tax the rents from New Jersey realty has the same practical effect as Ohio's attempt in *Senior* v. *Braden* to tax certificates of ownership in Illinois realty measured by the income thereof.

This Court has in a number of analogous situations affirmed our position that a tax on the income from property is in effect a tax upon the property-producing source of the income; and accordingly, where the property-producing source of the income—the land in the instant case—is clearly beyond the taxing jurisdiction of New York, that State cannot tax the income therefrom.

In the inheritance tax cases, as *Frick* v. *Pennsylvania*, *supra*, and *City Bank Farmers' Trust Co.* v. *Schnader*, *supra*, the States' attorneys argued that the tax was not upon the property transferred, but upon the right or privilege of transfer granted by the domiciliary State. This Court, however, looked through form to substance and held that, in essence, such a tax is one on the property transferred.

Moreover, in levying such an inheritance tax, the domiciliary State is not permitted to measure the so-called privilege tax by including property beyond its jurisdictional limits. In *Farmers' Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 210, this Court expressed itself in the following clear and emphatic language:

> "In this Court the presently approved doctrine is that no State may tax anything not within her jurisdiction without violating the Fourteenth Amendment [citations]. Also, no State can tax the testamentary transfer of property wholly beyond her power [citations], or impose death duties reckoned upon the value of tangibles permanently located outside her limits [citations]."

See also:

R. I. Trust Co. v. *Doughton*, 270 U. S. 69.

In the instant case the Court should similarly disregard the purely legalistic argument that an income tax on incomes derived from rents is not upon property but upon the privilege of its receipt or use within the State, and should here too look through form to substance. The right to income from realty is as much an element of the property concept as is the right to its devolution or transfer. If, accordingly, a tax on its devolution constitutes a tax upon the property, then similarly a tax upon the fruits of the land is, in effect, a tax upon the land. And if New York may not tax the devolution of land beyond its borders, then likewise it cannot tax the fruits of the land situate in another State.

In a series of decisions concerning taxation of incomes derived from a governmental instrumentality, this Court has again enunciated the proposition that a tax on income derived from constitutionally exempt property is void. Of what value, this Court argued, is the constitutional exemption from taxation to the physical property if its income can be subjected to State taxation?

In *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 585, in addition to the issue already discussed—whether a tax on rent income constituted a tax on land—this Court was called upon to determine the validity of the Federal income tax levied upon the income derived from municipal bonds. After deciding that a municipal corporation is an instrumentality of the State government and that accordingly its property and revenues are beyond Federal taxing jurisdiction, the Court held that the relationship between such municipal securities and the income therefrom was so close that the preclusion of the former from Federal taxation covered the latter. The Court said:

> "It is contended that although the property or revenues of the States or their instrumentalities cannot be taxed, nevertheless the income derived from state, county, and municipal securities can be taxed. But we think the same want of power to tax the property or revenues of the States or their instrumentalities exists in relation to a tax on the income from their securities * * *."

In *Gillespie* v. *Oklahoma*, 257 U. S. 501, this Court, after finding that leases of restricted Indian lands constituted an instrumentality used by the United States in fulfilling its duties to the Indians, held that the State could not tax the net income derived by the lessee from the sale of his share of oil and gas under the lease. The Court said, at page 505:

> "'A tax upon the leases is a tax upon the power to make them, and could be used to destroy the power to make them.' 240 U. S. 530. The step from this to the invalidity of the tax upon income from the leases is not long. In cases where the principal is absolutely

> immune from interference an inquiry is allowed into the sources from which net income is derived and if a part of it comes from such a source the tax is *pro tanto* void."

The doctrine of the *Gillespie* case has been consistently accepted and followed by this Court. In *Northwestern Mutual Life Ins. Co.* v. *Wisconsin*, 275 U. S. 136, this Court held unconstitutional a State annual license fee on domestic insurance companies which consisted of 3% annually of the gross income of a corporation, where the income was in part interest from tax-free United States bonds. The Court said, at page 140:

> "Certainly, since Gillespie v. Oklahoma [citation] it has been the settled doctrine here that where the principal is absolutely immune, no valid tax can be laid upon income arising therefrom. * * * Accordingly, if the challenged acts, whatever called, really imposes a direct charge upon interest derived from United States bonds, it is *pro tanto* void."

National Life Ins. Co. v. *United States*, 277 U. S. 508, 521, declared invalid a provision of a Federal act which treated tax-exempt securities in such a manner as to render their income taxable. The Court said:

> "It is settled doctrine that directly to tax the income from securities amounts to taxation of the securities themselves."

Likewise must it be true that directly to tax the income from land is in effect the taxation of the land itself.

In the instrumentalities cases it is significant to note that this Court was not influenced by the possibility of a taxpayer receiving his total income from exempt securities and thus not paying for the so-called "protection" afforded him by his domiciliary State.

While the instrumentalities cases are an outgrowth of the constitutional doctrine of Federal-State relationship rather than of the due process clause of the Fourteenth Amendment,

the legal reasoning underlying them is applicable to the instant case. In the instrumentalities cases the Court, in effect, decided that, because of the Federal-State relationship, the States lack jurisdiction to tax Federal instrumentalities. In the cases, as the instant one, under the due process clause, the Court has said that, because of the relationship of one State to another, a State lacks jurisdiction to tax property that has a situs beyond its boundaries. In both types of cases the basic issue is that of State-taxing jurisdiction and the reasoning employed is that which we here invoke.

Land tax-exemption cases also illustrate our contention that, because of the economic intimacy between land and its rents, a tax on the income from land is in effect a tax on the land itself. Where, pursuant to statutory authorization, land is rendered exempt from taxation, the courts have held that the income from the land is similarly exempt. In *Oahu Railway & Land Co.* v. *Pratt*, 14 Hawaii 126, 128, cited with approval by this Court in *Gillespie* v. *Oklahoma*, *supra*, the court stated:

> "It is contended on behalf of the defendant that income is a separate and distinct thing from the property from which it is derived and that although the exemption includes all property 'fairly necessary to the reasonable construction, maintenance and operation' of the road, it does not follow that the income from such property is exempt and cannot be taxed. This contention may be ingenious but it can scarcely be considered sound. It is not material to the determination of the question presented whether or not the income and the property producing the income are one and the same thing. The real question is whether or not a tax on the income is a tax on the property from which the income is derived."

We respectfully submit that upon analysis no logical differentiation exists between a tax on land and a tax on the rents thereof within the meaning of the rule that a State may not tax lands situated beyond its borders.

POINT C.

The decisions of this Court do not preclude a holding that New York is powerless to tax the income of a New York resident derived from rents of New Jersey realty.

An attempted analogy to the powers of the Federal Government to levy income taxes from property owned by American citizens in foreign countries would be fallacious. The jurisdictional limits of Federal as compared to State taxation are so fundamentally different that the argument is impaled upon the horns of its own dilemma. If the analogy had any merit, then the fact that New York cannot levy a property or an inheritance tax upon land or tangible chattels owned by a New York resident in New Jersey would logically lead to the conclusion that the United States could not levy a property or estates tax upon land or tangible chattels owned by an American citizen in a foreign country. This conclusion is patently untrue.

United States v. *Bennett*, 232 U. S. 299.
Frick v. *Pennsylvania*, 268 U. S. 473, 491.

In *United States* v. *Bennett*, 232 U. S. 299, 306, in sustaining a Federal tax upon a vessel belonging to an American citizen and located in foreign waters, this Court took the opportunity of differentiating the restrictive tax operation of the Fourteenth and Fifth Amendments. The Court said:

> "The application to the States of the rule of due process relied upon comes from the fact that their spheres of activity are enforced and protected by the Constitution and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution, for where the power of the one ends the authority of the other begins. But this has no application to the Government of the United States so far as its admitted taxing power is concerned. It is co-extensive with the limits of the United States; it knows no restriction except where one is expressed in or arises from the Constitution and therefore embraces all the attributes which appertain to sovereignty in the fullest sense."

This proposition was reiterated in *Cook* v. *Tait*, 265 U. S. 47, 56. After approving the *Bennett* case, this Court said:

> "In other words, the principle was declared that the government [of the United States], by its very nature, benefits the citizen and his property, wherever found, and therefore has the power to make the benefit complete. Or, to express it another way, the basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, nor was not and cannot be made dependent upon the domicil of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen. The consequence of the relations is that the native citizen who is taxed may have domicil, and the property from which his income is derived may have situs, in a foreign country, and the tax be legal—the government having power to impose the tax."

And in *Burnet* v. *Brooks*, 288 U. S. 378, wherein this Court sustained a Federal estates tax on intangible property owned in the United States by a non-resident alien, the taxpayer, in endeavoring to demonstrate the lack of taxing jurisdiction of the United States, relied heavily on the decisions of this Court with respect to the limitation of the taxing power of the States under the due process clause of the Fourteenth Amendment. This argument, the Court declared, is "specious" and "ignores an established distinction." The Court said, at pages 401, 403:

> "These decisions [*Farmers' Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *First National Bank* v. *Maine*, 284 U. S. 312] established that proper regard for the relation of the States in our system required that the property under consideration should be taxed in only one State, and that jurisdiction to tax was restricted accordingly. * * * But it has been as decisively maintained that this principle, *thus progressively applied in limiting the jurisdiction of the States to tax*, does not restrict the taxing power of the Federal Government." (Italics ours.)

The decisions of this Court in *Maguire* v. *Trefry*, 253 U. S. 12, and *Lawrence* v. *Mississippi*, 286 U. S. 276, sustaining the right of the domiciliary State to tax the income of residents derived from securities without taxable situs elsewhere or personal activities elsewhere are not determinative of the right of the domiciliary State to tax the income of residents derived from rents from realty in another State.

In *Maguire* v. *Trefry, supra*, it was held that a resident beneficiary of a foreign administered trust of intangibles might be taxed upon the income received from the trust estate. This decision is not a precedent in the instant litigation. Firstly, the *Maguire* case dealt with intangibles; the instant case with the most tangible of tangibles, land. While controversies may be waged concerning the place where the securities have become such an integral part of the economic structure of a State, as to gain a situs there, no such dispute can possibly arise in the case of land.

Senior v. *Braden*, 295 U. S. 422.

Secondly, this Court has characterized *Maguire* v. *Trefry* as not consistent with its present views. In *Senior* v. *Braden*, 295 U. S. 422, 432, the State of Ohio relied on the *Maguire* case, and the Court said of the *Maguire* decision:

> "The opinion accepted and followed the doctrine of Blackstone v. Miller [citation] and Fidelity and Columbia Trust Co. v. Louisville [citation]. Those cases were disapproved by Farmers Loan and Trust Co. v. Minnesota [citation]. They are not in harmony with Safe Deposit & Trust Co. v. Virginia [citation], and *views now accepted here in respect of double taxation.*" (Italics ours.)

A fundamental postulate of the *Maguire* decision was that the principle formulated in *Union Refrigerator Transit Co.* v. *Kentucky, supra*, did not apply to intangibles. This proposition, as we have indicated in Point A, *supra*, pages 8-9, is no longer accepted by this Court.

Safe Deposit & Trust Co. v. *Virginia, supra.*

Similarly, the *Maguire* case rested on the no longer acceptable assumption that the *cestui que trust's* equitable estate has a taxable situs at his domicile.

Safe Deposit & Trust Co. v. *Virginia, supra.*

Lawrence v. *Mississippi, supra,* likewise is not binding precedent. There the domiciliary State, taxing a resident's income, included profits from road-building in another State. The taxpayer there argued that the tax was merely an excise or occupation tax and could not be applied to his activities in another State; this argument the State obviously could refute with little difficulty. In the *Lawrence* case the domiciliary State taxed income from personal activities. Whatever may be claimed for its reasoning or scope, that case is essentially different, by sound legal and practical tests, from the case at bar, where one State is imposing an income tax upon the rents from land located in another State. And we need not explain to this Court the fundamental differences between personal activities and rents.

CONCLUSION.

Throughout legal history the courts have most carefully protected land and its attributes. Whether considered as a subject of taxation or otherwise, land has always enjoyed legal consideration, not found applicable to other classes of property. Land and its enjoyment—whether in the form of crops, fruits, or the rents thereof—have been recognized as integrally related. To separate one from the other, to recognize that one, the land, cannot be taxed and at the same time to hold that that which it produces, the rents, can be taxed, surely introduces an element of conflict between these two integral elements. Such a holding would constitute the use of a product as a means of attack upon the thing itself, where such attack could not constitutionally be made directly.

Beyond question, multiple taxes upon the rents of land impair the value of the land. The New York Court of Ap-

peals, by a closely divided vote, has in the instant case upset what was thought to be a definite situation and has introduced a new constitutional principle which if upheld would subject land to multiple taxation throughout the country. That determination, it is respectfully submitted, should be reversed.

Respectfully submitted,

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Trustee of J. M. Joseph Trust,
as *Amicus Curiae*.

EDGAR M. LEVENTRITT,
WM. R. GREEN, JR.,
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November 27, 1936.

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SUPREME COURT OF THE UNITED STATES.

No. 404.—October Term, 1936.

The People of the State of New York ex rel Annie Cohn, Appellant, *vs.* Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York.	Appeal from the Supreme Court of the State of New York.

[March 1, 1937.]

Mr. Justice Stone delivered the opinion of the Court.

This case presents the question whether a state may constitutionally tax a resident upon income received from rents of land located without the state and from interest on bonds physically without the state and secured by mortgage upon lands similarly situated.

Section 351 of Article 16 of the New York Tax Law (N. Y. Laws 1919, c. 627), imposes a tax upon the "entire net income" of residents of the state. By § 359 gross income is defined as including interest and rent. The same section, as amended by N. Y. Laws 1935, c. 933, enumerates among the items of taxable income "rent (including rent derived from real property situated outside the state) . . . it being intended to include all the foregoing items without regard to the source thereof, location of the property involved, or any other factor except only a case where the inclusion thereof would be violative of constitutional restrictions."

Appellant, a resident of New York, brought the present *certiorari* proceeding in the courts of New York to review a determination of the State Tax Commission, appellees, denying her application for a refund of state income taxes assessed and paid for the years 1931 and 1932, so far as the taxes were attributable to rents received by appellant from New Jersey land, and interest paid on bonds secured by mortgaged real estate in New Jersey, where the

bonds and mortgages were physically located. A ground for recovery of the tax assigned by appellant's petition was that the tax was in substance and effect a tax on real estate and tangible property located without the state, in violation of the Fourteenth Amendment of the Constitution of the United States. Judgment for appellant (see 246 A. D. 335), was reversed by the New York Court of Appeals, 271 N. Y. 353. The case comes here on appeal under § 237 (a) of the Judicial Code.

The stipulation of facts on which the case was tried in the state court does not indicate that appellant's income has been taxed by New Jersey, and it does not define the precise nature of her interest in the properties producing the income. It sets out that appellant's husband died testate, his will duly probated in New Jersey "devising and bequeathing to said taxpayer the entire net income from his estate for and during her widowhood," and that the taxed income included "rents from testator's real estate" and "interest from testator's real estate mortgages," all located in New Jersey. The terms of the will and the status of the estate during the tax years do not otherwise appear. There is nothing to show that the income-producing properties were in those years held upon an active trust, or that appellant did not receive the income as life tenant of the legal interest. See *Paletz* v. *Camden Safe Deposit & Trust Co.*, 109 N. J. Eq. 344; cf. *Passman* v. *Guarantee Trust & Safe Deposit Co.*, 57 N. J. Eq. 273; *Westfield Trust Co.* v. *Beekman*, 97 N. J. Eq. 140. Any uncertainty arising from the ambiguity of the stipulation, if it has any present significance, is put at rest by the concession of appellant in brief, and in open court on the argument, that she is the owner of a life estate or interest in the properties, and that she received, as a part of her income in the tax years, the rents and interest which have been collected by the executors acting, not in their capacity as executors, but as her agents for an annual compensation.

In any case we may assume, for present purposes, that New York may not levy a property tax upon appellant's interest, whether it be legal or equitable, see *Senior* v. *Braden*, 295 U. S. 422; *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83. We accordingly limit our review to the question considered and decided by the state court, whether there is anything in the Fourteenth Amendment which precludes the State of New York from taxing the in-

come merely because it is derived from sources, which, to the extent indicated, are located outside the State.

Income from rents. That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. "Taxes are what we pay for civilized society . . . ", see *Compañia Gen. de Tobacos* v. *Collector,* 275 U. S. 87, 100. A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the state. To them and to the equitable distribution of the tax burden, the economic advantage realized by the receipt of income and represented by the power to control it, bears a direct relationship. See *Lawrence* v. *State Tax Comm.,* 286 U. S. 276; *Maguire* v. *Trefry,* 253 U. S. 12, 14; *Virginia* v. *Imperial Sales Coal Co.,* 293 U. S. 15, 19; compare *Shaffer* v. *Carter,* 252 U. S. 37, 50.

Neither the privilege nor the burden is affected by the character of the source from which the income is derived. For that reason income is not necessarily clothed with the tax immunity enjoyed by its source. A state may tax its residents upon net income from a business whose physical assets, located wholly without the state, are beyond its taxing power, *Lawrence* v. *State Tax Comm., supra;* see *Shaffer* v. *Carter, supra,* at 50. It may tax net income from bonds held in trust and administered in another state, *Maguire* v. *Trefry, supra,* although the taxpayer's equitable interest may not be subjected to the tax, *Safe Deposit & Trust Co.* v. *Virginia, supra.* It may tax net income from operations in interstate commerce, although a tax on the commerce is forbidden, *United States Glue Co.* v. *Town of Oak Creek,* 247 U. S. 321; *Shaffer* v. *Carter, supra.* Congress may lay a tax on net income derived from the business of exporting merchandise in foreign commerce, although a tax upon articles exported is prohibited by constitutional provision (Art. I,

§ 9, Cl. 5). *Peck & Co.* v. *Lowe*, 247 U. S. 165; *Barclay & Co.* v. *Edwards*, 267 U. S. 442, 447.

Neither analysis of the two types of taxes, nor consideration of the bases upon which the power to impose them rests, supports the contention that a tax on income is a tax on the land which produces it. The incidence of a tax on income differs from that of a tax on property. Neither tax is dependent upon the possession by the taxpayer of the subject of the other. His income may be taxed, although he owns no property, and his property may be taxed, although it produces no income. The two taxes are measured by different standards, the one by the amount of income received over a period of time, the other by the value of the property at a particular date. Income is taxed but once; the same property may be taxed recurrently. The tax on each is predicated upon different governmental benefits; the protection offered to the property in one state does not extend to the receipt and enjoyment of income from it in another.

It would be pressing the protection which the due process clause throws around the taxpayer too far to say that because a state is prohibited from taxing land which it neither protects nor controls, it is likewise prohibited from taxing the receipt and command of income from the land by its resident, who is subject to its control and enjoys the benefits of its laws. The imposition of these different taxes, by the same or different states, upon these distinct and separable taxable interests, is not subject to the objection of double taxation, which has been successfully urged in those cases where two or more states have laid the same tax upon the same property interest in intangibles or upon its transfer at death. *Safe Deposit & Trust Co.* v. *Virginia, supra; Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1; *First National Bank* v. *Maine*, 284 U. S. 312. These considerations lead to the conclusion that income derived from real estate may be taxed to the recipient at the place of his domicil, irrespective of the location of the land, and that the state court rightly upheld the tax.

Nothing which was said or decided in *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, calls for a different conclusion. There the question for decision was whether a federal tax on income derived from rents of land is a direct tax requiring apportionment under

Art. I, § 2, Cl. 3 of the Constitution. In holding that the tax was "direct", the Court did not rest its decision upon the ground that the tax was a tax on the land, or that it was subject to every limitation which the Constitution imposes on property taxes. It determined only that for purposes of apportionment there were similarities in the operation of the two kinds of tax which made it appropriate to classify both as direct, and within the constitutional command. See *Pollock* v. *Farmers Loan & Trust Co., supra,* pp. 580, 581; *Brushaber* v. *Union Pacific R. R.,* 240 U. S. 1, 16. And in *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 204, decided ten years after the *Pollock* case, the present question was thought not to be foreclosed.

It is by a parity of reasoning that the immunity of income-producing instrumentalities of one government, state or national, from taxation by the other, has been extended to the income. It was thought that the tax, whether on the instrumentality or on the income produced by it, would equally burden the operations of government. See *Collector* v. *Day,* 11 Wall. 113, 124; *Pollock* v. *Farmers Loan & Trust Co., supra,* 583; *Gillespie* v. *Oklahoma,* 257 U. S. 501. But as we have seen, it does not follow that a tax on land and a tax on income derived from it are identical in their incidence or rest upon the same basis of taxing power, which are controlling factors in determining whether either tax infringes due process.

In *Senior* v. *Braden, supra,* on which appellant relies, no question of the taxation of income was involved. By concession of counsel, on which the Court rested its opinion, "if the interest taxed was land or an interest in land situate within or without the state," the tax was invalid, and the Court held that the interest represented by the certificates subjected to the tax was an equitable interest in the land. Here the subject of the tax is the receipt of income by a resident of the taxing state, and is within its taxing power, even though derived from property beyond its reach.

Income from bonds secured by New Jersey mortgages. What has been said of the power to tax income from land without the state is decisive of the objection to the taxation of the income from interest on bonds because they are secured by mortgages on land without the state, compare *Kirtland* v. *Hotchkiss,* 104 U. S. 491. Appellant also argues that the interest from the bonds is immune from

taxation by New York because they have acquired a business situs in New Jersey within the doctrine of *New Orleans* v. *Stempel,* 175 U. S. 309; *Metropolitan Life Ins. Co.* v. *New Orleans,* 205 U. S. 395; *Wheeling Steel Corporation* v. *Fox,* 298 U. S. 193. This contention, if pertinent to the present case, is not supported by the record. The stipulation of facts discloses only that the bonds and mortgages were located in New Jersey. See *Baldwin* v. *Missouri, supra; Blodgett* v. *Silberman,* 277 U. S. 1, 14, 15. The burden rested on the taxpayer to present further facts which would establish a "business situs." *Beidler* v. *South Carolina Tax Commission,* 282 U. S. 1, 8.

Retroactive application of the tax. Appellant insists that in upholding the tax upon her income for 1931 and 1932 the state court infringed due process by giving retroactive effect to the 1935 amendment of § 359 of the New York Tax Law, which specifically declared that rents, embraced in taxable income by the section before amendment, should include rent from real property without the state. In support of this contention appellant points to the decision in *People ex rel Pierson* v. *Lynch,* 266 N. Y. 431, affirming 237 App. Div. 763, that rents from land outside the state were not taxed by that section before its amendment, and to the dismissal by this Court of the writ of *certiorari* to review the judgment for want of a properly presented federal question. 293 U. S. 52.

It is unnecessary for us to determine whether, or to what extent, the state court, in sustaining the tax in this case, rested its decision on the amendment of 1935, or whether it regarded it as anything more than a clarifying act pointing out the meaning properly attributable to the section before amendment. The record does not disclose that appellant raised in the state court the objection, which she presses here, to the retroactive application of the statute. In reviewing the judgment of a state court, this Court will not pass upon any federal question not shown by the record to have been raised in the state court or considered there, whether it be one arising under a different or the same clause in the Constitution with respect to which other questions are properly presented. *Bolln* v. *Nebraska,* 176 U. S. 83; *New York* v. *Kleinert,* 268 U. S. 646; *Saltonstall* v. *Saltonstall,* 276 U. S. 260.

Affirmed.

SUPREME COURT OF THE UNITED STATES.

No. 404.—October Term, 1936.

The People of the State of New York *ex rel.* Annie Cohn, Appellant, *vs.* Mark Graves, John J. Merrill and John P. Hennessey, as Commissioners Constituting the State Tax Commission of the State of New York.	Appeal from the Supreme Court of the State of New York.

[March 1, 1937.]

Mr. Justice Butler, dissenting.

The tax is on income. I am of opinion that the rents received by appellant for the use of real estate in New Jersey may not be included in her taxable income. By our decisions it is established that a tax on income received for the use of land is in legal effect a tax upon the land itself. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 580-581; 158 U. S. 601, 627-628, 637. *Thomas* v. Gay, 169 U. S. 264, 274. *Knowlton* v. *Moore*, 178 U. S. 41, 80-82. *McCoach* v. *Minehill Railway Co.*, 228 U. S. 295, 306. *Stratton's Independence* v. *Howbert*, 231 U. S. 399, 414. *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, 16. *Eisner* v. *Macomber*, 252 U. S. 189, 205. *Evans* v. *Gore*, 253 U. S. 245, 260. *Gillespie* v. *Oklahoma*, 257 U. S. 501, 505. *Lake Superior Mines* v. *Lord*, 271 U. S. 577, 581-582. *Senior* v. *Braden*, 295 U. S. 427, 429, 431-432.

New Jersey, in addition to tax on the land measured by its value, may lay a tax upon the income received by the owner for its use. *Lake Superior Mines* v. *Lord, ubi supra.*

Appellant's right to own, or to collect rents in New Jersey for the use of, lands in that State was not given and is not protected by New York law. Neither of these rights is enjoyed in New York or has any relation to appellant's privilege of residence in, or to the protection of, that State. Ability of taxpayers to pay may be taken into account for apportionment of the tax burdens that it is authorized to impose. But the financial means of those to be taxed cannot be made to generate for the State power to tax lands, or rents paid for use of lands, beyond its borders. I would exclude the item.

Mr. Justice McReynolds concurs in this opinion.